BEFORE THE STATE ENGINEER

STATE OF NEW MEXICO

IN THE MATTER OF THE APPLICATION BY AUGUSTIN PLAINS RANCH, LLC FOR A PERMIT TO APPROPRIATE GROUND WATER IN THE RIO GRANDE UNDERGROUND WATER BASIN OF NEW MEXICO	)))))	Hearing No. 17-00509-096 OSE File No. RG-89943

THE COMMUNITY PROTESTANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

Introduction

The Protestants represented by the New Mexico Environmental Law Center (collectively "the Community Protestants", who are listed on page 47 *infra*) have filed a Motion for Summary Judgment requesting that the State Engineer enter an order dismissing the Augustin Plains Ranch's Corrected Application to Appropriate Ground Water from the Rio Grande Underground Water Basin ("the Corrected APR Application"). As is explained in this Memorandum, the Community Protestants' Motion for Summary Judgment ("Motion for Summary Judgment" or "Motion") is made on two alternative grounds.[1]

The first alternative ground for this Motion for Summary Judgment is that the Corrected APR Application[2] must be dismissed because it is invalid on its face for the reason that it does not set forth information that is required for an application to appropriate water, including:

- a beneficial use for the very large amount of water that the Augustin Plains Ranch

[1] Section 19.25.2.16 of the Office of the State Engineer Hearing Unit Procedures provides that the State Engineer Office procedures shall be consistent with the Rules of Civil Procedure. Rule 8.E(2) of those Rules authorizes the use of alternative statements of a claim or a defense.

[2] The Application is referred to as "Corrected" because it changed inaccurate descriptions of the locations of proposed wells in an earlier version of the Application, not because it addressed any of the substantive issues that are the bases of the Community Protestants' Motion.

("APR") proposes to appropriate;

- the place where the water to be appropriated would be used;
- with respect to possible use of the water for irrigation, where the irrigation would occur;
- information required for the State Engineer to provide due process for individuals and entities who may protest the proposed appropriation of water by APR; and
- information that is necessary for the State Engineer to determine whether the proposed appropriation would cause impairment or would be contrary to conservation of water or the public welfare.

The second alternative ground for the Motion is that the Corrected APR Application should be dismissed because the substance of the Corrected APR Application has already been determined to be facially invalid. The determination that the substance of the Corrected APR Application is invalid was made in two decisions denying the APR Application that was filed in 2007 and 2008 ("the Original APR Application"), which is identical in all material respects to the Corrected APR Application.

The first decision was the March 30, 2012 ruling by the State Engineer denying the Original APR Application (State Engineer's Denial Order) (Exhibit 1). The second decision was the January 3, 2013 ruling of the Seventh Judicial District Court affirming the State Engineer's denial of the Original APR Application (District Court Order)(Exhibit 2). That January 3, 2013 ruling was based on the District Court's Memorandum Decision on Motion for Summary Judgment, which was filed on November 14, 2012 (District Court Memorandum) (Exhibit 3).

This Memorandum is divided into three sections. Section I sets forth the standard of review by which this Motion should be evaluated. Section II explains that the Corrected APR Application is invalid on its face because of its failure to specify a beneficial use for the water

that the APR seeks to appropriate and its failure to provide other required information. Section III explains that the earlier decisions of the State Engineer and the District Court dismissing the Original APR Application require the State Engineer to dismiss the Corrected APR Application.

Argument

I. The Community Protestants' Motion for Summary Judgment should be evaluated pursuant to Rule 56 of the Rules of Civil Procedure.

The State Engineer's Office's Hearing Unit Procedures provide that procedures in State Engineer Office proceedings shall be "consistent with the Rules of Civil Procedure for the District Courts". Office of the State Engineer Hearing Unit Procedures, section 19.25.2.16. Pursuant to that section, the Community Protestants' Motion for Summary Judgment should be evaluated as a motion for summary judgment under Rule 1-056 of the Rules of Civil Procedure.

Rule 1-056 provides that a party may obtain summary judgment if there is no dispute as to any material fact and the party is entitled to judgment as a matter of law. Rule 1-056.C. *See also* Tafoya v. Rael, 2008-NMSC-057, ¶11, 145 N.M. 4, 6-7. Summary judgment is appropriate in situations in which the claim at issue is based on a document, such as a contract, that is unambiguous. *See* Bauer v. College of Santa Fe, 2003-NMCA-121, ¶¶11-12, 134 N.M. 439, 442. Rule 1-056 applies to this matter because there is no dispute as to any material fact and the Community Protestants are entitled to judgment as a matter of law on both of their claims.

The Community Protestants' first claim is that the Corrected APR Application does not provide the information that is required for the State Engineer to grant an application to appropriate ground water. That claim is based on the unambiguous text of the Corrected APR Application, as to which there is no dispute, and the application of pertinent law to that text. The Community Protestants' second claim is based on the undisputed texts of the Corrected APR Application and the Original APR Application as well as the earlier decisions of the State

Engineer and the Seventh Judicial District Court, which also are undisputed, and the application of pertinent law to those earlier decisions. The application of relevant law to the undisputed facts that are the bases for both of these claims makes clear that the State Engineer must dismiss the Corrected APR Application.

II. The Corrected APR Application must be dismissed because it fails to provide information that is required for an application to appropriate water.

A. An application to appropriate water must provide specific information.

The requirements for an application to appropriate ground water were emphasized in the State Engineer's Answer Brief in the State Court of Appeals addressing the Original APR Application (Exhibit 4).[3] There, the State Engineer stated:

> APR would have this Court believe that an application to appropriate groundwater submitted to the State Engineer requires no more detail than the notice pleading required for a civil complaint. **[BIC 46]** APR asserts, again without supporting authority, than an application only requires basic information because an applicant is automatically entitled to an evidentiary hearing at which the application can be developed. *Id.* This approach is inconsistent with the statutes and rules, which specify the information required for a sufficiently completed application. §72-12-3(A). By State Engineer rule, an application must set out the elements of water right that would actually be permitted. *See* 19.27.1.10 NMAC ("The application and permit limit the nature and extent of the water right.")

Answer Brief of Appellee New Mexico State Engineer in Court of Appeals case number 32,705 (Exhibit 4), page 32, emphasis in original.[4]

In this matter, the Corrected APR Application fails to include information that is required by the New Mexico Constitution and applicable New Mexico statutes and regulations. The Corrected APR Application therefore is invalid on its face, and it must be dismissed.

---

[3] As is explained in the procedural history of the Original APR Application (pp. 24-26, *infra*), APR appealed the decision of the Seventh Judicial District Court dismissing the Original APR Application to the State Court of Appeals.

[4] Exhibit 4 includes only the cover page and pages 32-35 of the State Engineer's Answer Brief in that case.

B. The Corrected APR Application is invalid because it fails to designate a beneficial use for the water that APR seeks to appropriate.

1. An application to appropriate water must specify a beneficial use for the water.

New Mexico law requires that an application to appropriate water must designate the beneficial use to which the water will be put. An application to appropriate ground water must designate "the beneficial use to which the water will be applied". NMSA 1978 §72-12-3.A. Under the law of prior appropriation:

> beneficial use [is] the basis, the measure and the limit of the right to the use of water.

N.M. Constitution, Article XVI, §3; NMSA 1978, § 72-1-2 (1941).

The New Mexico Supreme Court has pointed out that:

> In New Mexico, beneficial use shall be the basis, the measure and the limit of the right to the use of water. We have said that this fundamental principle is applicable to all appropriations of public waters. As it is only by the application of the water to a beneficial use that the perfected right to the use is acquired, it is evident that an appropriator can only acquire a perfected right to so much water as he [or she] applies to a beneficial use. .... The principle of beneficial use is based on 'imperative necessity' ... and aims fundamentally at definiteness and certainty.

State ex rel. Martinez v. City of Las Vegas, 2004-NMSC-009, ¶34, 135 N.M. 375, 386 (citations and quotation marks omitted).

Similarly, the State Court of Appeals has pointed out that:

> Water in New Mexico belongs to the state, subject to use by appropriation, the basis of which must be beneficial. Our constitution's framers clearly intended that no one has a right to use or divert water except for beneficial use.

Carangelo v. Albuquerque-Bernalillo County Water Utility Authority, 2014-NMCA-032, ¶35, 320 P.3d 492, 503 (citations and quotation marks omitted), *cert denied*, 322 P.3d 1062, 2014 N.M. LEXIS 147.

Pursuant to these principles, the State Engineer's regulations define a "water right" as:

> The legal right to appropriate water for a specific beneficial use. The elements of a water right generally include owner, point of diversion, place of use, purpose of use, priority date, amount of water, periods of use, and any other element necessary to describe the right.

§19.26.2.7(EE) NMAC.

The State Engineer's regulations also provide that in the case of ground water, the "point of diversion" is the well. §19.26.2.7(X) NMAC. In addition, as to water used for irrigation, a water right is defined" by the "specific tracts of land to which [the right] shall be appurtenant." NMSA 1978, §72-4-19.

A permit issued by the State Engineer is not a water right by itself. A permit's only purpose is to authorize the establishment of a water right consistent with the specific elements designated in the permit application. In other words, a "permit" is:

> A document issued by the state engineer that authorizes the diversion of water from a specific point of diversion, for a particular beneficial use, and at a particular place of use, in accordance with the conditions of approval. A permit allows the permittee to develop a water right through the application of water to beneficial use, in conformance with the permit's conditions of approval. A permit in itself does not constitute a water right.

§19.26.2.7 (W) NMAC.

This point was made clearly by the New Mexico Court of Appeals in Hanson v. Turney, 2004-NMCA-069, 136 N.M. 1, where the Court stated that a permit to appropriate water is:

> the authority to pursue a water right – a conditional but unfulfilled promise on the part of the state to allow the permittee to one day apply the state's water in a particular place and to a specific beneficial use under conditions where the rights of other appropriators will not be impaired.

2004 NMCA 069, ¶9, 136 N.M. 1, 3 (citation and quotation marks omitted).

Thus, acquisition of a permit is a mandatory pre-condition to establishing a specific water right, a water right that is expressly defined by and limited to a particular beneficial use. An application that fails to designate the beneficial use to which water will be applied and the

location of the beneficial use shall not be accepted by the State Engineer and therefore cannot be considered for permitting. NMSA 1978, §72-12-3.

2. The Corrected APR Application does not specify a beneficial use for the water to be appropriated.

As was pointed out above, the Corrected APR Application does not provide any definite information about the use to which the water to be appropriated would be put. It states:

> The water will be put to use by municipal, industrial and other users along the pipeline route shown on Exhibit D to Attachment 2. The water used for municipal purposes will be put to use within the authorized service areas of the municipalities listed in Attachment 2. The water used for bulk sales will be put to use by limited municipal and investor-owned utilities, commercial enterprises, and government agencies in parts of Catron, Sierra, Socorro, Valencia, Bernalillo, Sandoval and Santa Fe Counties as shown on Attachment 1 of Exhibit G.

Corrected APR Application, p. 3.

Attachment 2 to the Corrected APR Application states as well that the water will be used in Catron, Sierra, Socorro, Valencia, Bernalillo, Sandoval, and Santa Fe counties. Corrected APR Application, Attachment 2, Section III.3, page 3. A second description in Attachment 2 also fails to indicate a specific location where the water would be used or who the user of the water would be. It states that:

> Applicant [APR] intends to provide water for municipal purposes in one or more of the following municipalities:

Municipal Entity	**Service Area**
Magdalena	Within the service area of the Village of Magdalena municipal water system
Socorro	Within the corporate limits of the City of Socorro
Belen	Within the service area of the City of Belen municipal water system in Valencia County, New Mexico

Los Lunas	Village of Los Lunas municipal water system service area
Albuquerque Bernalillo County Water Utility Authority	Service area of the Albuquerque Bernalillo County Water Utility Authority municipal water system
Rio Rancho	Town of Alameda Grant West of the Rio Grande and surrounding areas in Sandoval County

Corrected APR Application, Attachment 2, Section III.5.A, page 4 (footnotes omitted).

In addition, Section III.5.B of Attachment 2 indicates:

> Applicant [APR] plans to conduct commercial water sales in the parts of Catron, Sierra, Socorro, Valencia, Bernalillo, Sandoval, and Santa Fe counties that are situated within the geographic boundaries of the Rio Grande Basin ....

Corrected APR Application, Attachment 2, Section III.5.B, page 5.

Notably, although the municipalities of Magdalena and Socorro are both listed as possible users of the water to be extracted pursuant to the Corrected APR Application, each of those municipalities filed a protest against the Application.[5]

Finally, although the Corrected APR Application provides a blank example of a "long term water supply water agreement", the contract provides no information about who would use the water at issue or the purpose or place of use of that water. *See* sample contract attached as exhibit F to Attachment 2 to the Corrected APR Application.

The Corrected APR Application therefore does not designate any specific use for the water that the APR proposes to appropriate. On the contrary, the Corrected APR Application indicates that the water would be used by municipal, industrial and other users, and that the water used for bulk sales will be put to use by utilities, commercial enterprises, and government

[5] The Village of Magdalena's protest was dismissed for failure to pay the $25 protest fee. *See* State Engineer Hearing Officer Scheduling Order Attachment A, p. 4.

agencies in parts of seven different counties which, together, include approximately 12 million acres of land in New Mexico. Finally, the Corrected APR Application lists five municipalities and the Albuquerque/Bernalillo County Water Utility Authority as possible users of the water to be appropriated. At no point, however, does the Corrected APR Application indicate that the water will be used for a specific purpose or at a specific location.

The Corrected APR Application therefore must be dismissed because of its failure to designate a beneficial use for the water that APR seeks to appropriate.

C. The Corrected APR Application must be dismissed because it fails to designate a specific point of diversion of water.

1. An application to appropriate water must specify the point of diversion.

An application for a permit to appropriate ground water must contain specific elements, including a description of the location of the well to be used for the appropriation. NMSA 1978, §72-12-3.A(3). Section 9.26.2.7(W) NMAC of the State Engineer's regulations defines a "permit" as a:

> document ... that authorizes the diversion of water from a specific point of diversion [and that] allows the permittee to develop a water right ....

Similarly, section 19.27.1.10 NMAC requires that:

> the annual amount of the appropriation permitted under one [permit] application ... be limited to the annual amount that can reasonably be expected to be produced and applied to beneficial use from a single well.

An application to appropriate ground water therefore must specify the well that is the point of diversion of the water to be appropriated.

2. The Corrected APR Application fails to designate the point of diversion of the water to be appropriated.

The Corrected APR Application fails to designate the point of diversion of the water to be appropriated, designating instead the locations of 37 separate wells. Notice of publication of

Corrected APR Application (Exhibit 5), p. 1. As a result, no specific well, *i.e.*, no specific point of diversion, can be associated with any specific beneficial use, amount of water, or place of use. On the contrary, any given well or wells could be associated with any amount of water and any place or purpose of use. Moreover, it is unclear whether APR is seeking to establish 37 separate water rights, with each right associated with a single well, or one right having 36 "supplemental wells" or alternate points of diversion. In either case, the Corrected APR Application violates New Mexico law and must be dismissed.

D. The Corrected APR Application should be dismissed because it fails to provide critical information that is required to determine the impacts of the proposed appropriation.

1. An application to appropriate water must be evaluated to determine whether it will impact existing uses of water and whether it is contrary to conservation of water and the public welfare.

To evaluate an application to appropriate water, the State Engineer has a mandatory statutory duty to determine whether the proposed appropriation will (1) "impair existing water rights from the source," (2) be "contrary to conservation of water within the state," or (3) be "detrimental to the public welfare of the state." NMSA 1978, §72-12-3(E). The State Engineer must also necessarily determine that the amount of water requested is reasonable given its intended uses, and that it will be applied to a specific beneficial use within a reasonable amount of time. As the New Mexico Supreme Court stated in State ex rel. Martinez v. City of Las Vegas, 2004-NMSC-009, 135 N.M. 375:

> In applying these principles, we have recognized that water users have a reasonable time after an initial appropriation to put water to beneficial use ....

2004-NMSC-009, ¶35, 135 N.M. 375, 387 (citations omitted).

2. The Corrected APR Application does not provide sufficient information for the State Engineer to make these determinations.

Because the Corrected APR Application fails to describe the specific elements required by section 72-12-3, NMSA 1978, and because the options sought by the Corrected APR Application are practically limitless, the State Engineer cannot adequately evaluate the Corrected APR Application, and it must be dismissed.

For example, because the Corrected APR Application fails to describe any specific beneficial use, the State Engineer cannot determine whether there is in fact a demand for the amount of water requested for appropriation, or whether the Corrected APR Application is contrary to the conservation of water or detrimental to public welfare. The State Engineer also cannot determine whether water will be applied to beneficial use within a reasonable time. The State Engineer can only lawfully make those determinations on the basis of the information in the application, and the Corrected APR Application has failed to designate any specific beneficial use. Neither can the State Engineer determine whether the appropriation of water sought by the Corrected APR Application would impair any existing water right. To analyze possible impairment, the State Engineer would need to know, for example, whether any of the water that is sought by the Corrected APR Application would be used for irrigation, thus potentially recharging affected aquifer(s) with return flow, but the Corrected APR Application does not provide that information. The Corrected APR Application indicates at least three times[6] that the water to be appropriated may be used by farmers, but there is no indication where those farmers are located or what, if any, aquifers would be recharged. Furthermore, the Corrected APR Application does not indicate whether water would be discharged into surface water

[6] *See* Corrected APR Application, Attachment 2, Exhibit A, pp. 5, 10; Corrected APR Application, Attachment 2, Exhibit D, p. 1.

systems as return flow or for the purpose of offsetting the impacts resulting from municipal ground water pumping. Without any specificity as to end uses for the water, the State Engineer therefore cannot adequately analyze the impacts that would result from approving the Corrected APR Application.

Because of the Corrected APR Application's failure to provide this information, the State Engineer cannot evaluate the Application and it must be dismissed.

E. Any effort by the Corrected APR Application to appropriate water for irrigation must be denied because the Corrected APR Application fails to designate lands to be irrigated with the water sought to be appropriated.

1. An application to appropriate water for irrigation must specify the land to be irrigated.

An application to appropriate ground water to be used for irrigation must include "the description of the land to be irrigated and the name of the owner of the land". NMSA 1978, §72-12-3.A.7. It is particularly important to designate "the land to be irrigated" because, unlike every other type of water right, irrigation water rights are by law made "appurtenant" to the land that is irrigated:

> [All] waters appropriated for irrigation purposes, except as otherwise provided by written contract between the owner of the land and the owner of any ditch, reservoir or other works for the storage or conveyance of water, shall be appurtenant to specified lands owned by the person, firm or corporation having the right to use the water, so long as the water can be beneficially used thereon ....

NMSA 1978, §72-1-2.

This point was also made by the New Mexico Supreme Court in Walker v. United States, 2007-NMSC-038, 142 N.M. 45, where the Court pointed out that:

> The sole exception to the general rule that water rights are separate and distinct from the land is water used for irrigation.

2007-NMSC-038, ¶23, 145 N.M. 45, 52.

As a general rule, the person who owns the irrigated land will also own the water right – even if he is not the one who diverts the water – and any transfer of his land will automatically carry with it all appurtenant water rights. *Id.*

This point is also made by statute:

> [T]he transfer of title of land in any manner whatsoever shall carry with it all rights to the use of water appurtenant thereto for irrigation purposes, unless previously alienated in the manner provided by law.

NMSA 1978, §72-5-22.

Finally, the New Mexico Supreme Court reached the same conclusion in Snow v. Abalos, 1914-NMSC-022, 18 N.M. 681:

> [T]he water right, is appurtenant to specified lands, and inheres in the owner of the land; that the right is ...owned and exercised by the individual, and, the officers of the community acequia, in diverting the water act only as the agents of the appropriator.

1914-NMSC-022, ¶15, 18 N.M. 681, 695-696:

Accordingly, an application must identify both the lands that will have appurtenant water rights and the owner of those lands.

2. The Corrected APR Application fails to identify lands to be irrigated with the water to be appropriated.

The Corrected APR Application does not identify land to be irrigated; the Application only states that the water to be appropriated may be used by farmers. *See* Corrected APR Application, Attachment 2, Exhibit A, pp. 5, 10; Corrected APR Application, Attachment 2, Exhibit D, p. 1. In addition, the Application's very broad language listing possible uses for the water could include irrigation. That language states that the water could be used by municipal, industrial and other users along the pipeline route shown in Exhibit D to Attachment 2 to the Corrected APR Application, and for bulk sales will be put to use by limited municipal and

investor-owned utilities, commercial enterprises, and government agencies in parts of Catron, Sierra, Socorro, Valencia, Bernalillo, Sandoval and Santa Fe Counties as shown on Attachment 1 of Exhibit G to the Corrected APR Application. *See* Corrected APR Application, p. 3.

The Corrected APR Application's references to use of the water by farmers and the Application's language indicating that the water to be appropriated could be used for a variety of possible purposes implies that the water could be used for irrigation. However, there is no information about what land would be irrigated or who owns any land to be irrigated. Thus, based on the Corrected APR Application, one cannot determine with any certainty whether or where irrigation water rights will become appurtenant. That is another defect in the Corrected APR Application that mandates dismissal of the Application.

F. The Corrected APR Application should be dismissed because it has the same defects as the State Engineer's discredited dedication program.

The Corrected APR Application presents the same problems that existed with the dedication program that was formerly used by the State Engineer but that has been discarded.

Prior to 1994, the State Engineer approved appropriations of ground water that were hydrologically connected to surface water, and that would thus deplete surface flows, so long as the applicant agreed to later obtain and retire adequate surface water rights to offset the depletion. In 1994, the Attorney General evaluated the State Engineer's dedication policy and concluded that it was unlawful because without knowing exactly which surface water rights would be retired, the State Engineer could not adequately perform his statutory evaluation:

> Absent the critical information about the location and specifics of the water rights to be retired, it is impossible for the State Engineer to make a finding that the new appropriation-plus-retirement is not contrary to the conservation of water and will not be detrimental to the public welfare. NMSA 1978, §72-12-3. Similarly, it is impossible for the State Engineer to find that the new appropriation-plus-retirement will not impair any existing rights because whether there will be impairment depends upon the location and nature of the rights to be retired. *Id.*

> Moreover, since the public notice describes only the new permit application and not the surface water rights to be retired, the public is never notified of a key part of the transaction and cannot meaningfully participate in the process. In the absence of adequate public notice, comment, and opportunity to protest, the State Engineer cannot fully evaluate impacts on existing water rights, public welfare, and water conservation.

1994 N.M. AG LEXIS 8 (Opinion 94-07 [revised]), ¶¶12-13 (1994).

That opinion by the Attorney General led to the termination of the dedication program, which is no longer employed by the State Engineer.

The reasoning of the Attorney General concerning the dedication program is applicable in this matter. The Corrected APR Application provides no information about the specific purpose, place or amount of beneficial use of the water to be appropriated. Without that information, the State Engineer cannot fully evaluate the Corrected APR Application's impacts on existing water rights, public welfare, and water conservation. Therefore, the State Engineer must dismiss the Corrected APR Application for the same due process reasons that the dedication policy was abandoned.

G. <u>The Corrected APR Application should be denied because it cannot be approved without denying procedural due process to the owners of water rights that may be affected by the proposed appropriation.</u>

The State Engineer must give water rights holders and others meaningful notice of an application to appropriate water so that they may protect their rights:

> Upon the filing of an application, the state engineer shall cause to be published in a newspaper that is published and distributed in the county where the well will be located and in each county where the water will be ... put to beneficial use or where other water rights may be affected ... a notice that the application has been filed and that objections to the granting of the application may be filed within ten days after the last publication of the notice. Any person, firm or corporation or other entity objecting that the granting of the application will impair the objector's water right shall have standing to file objections or protests.

NMSA 1978, §72-12-3(D).

However, the Corrected APR Application fails to provide critical information, including but not limited to:

- how, when and where the water sought to be appropriated will be applied to beneficial use;
- which beneficial use(s) will be accomplished through the Corrected APR Application;
- whether any of the water at issue will be used for irrigation, and, if so, where that irrigation will occur and what, if any return flow will occur;
- whether water will be used to offset municipal ground water pumping and, if so, whether such increased pumping will impair existing rights; and
- what conservation measures will be applied to the use of the water at issue.

The absence of this and other information makes it impossible for the State Engineer to provide meaningful notice to the holders of water rights that may be affected by the proposed appropriation and others, which means that the State Engineer cannot afford those parties procedural due process.

The inability to provide adequate notice was one of the bases for the Attorney General's conclusion that the State Engineer's discredited dedication policy violated applicable law:

> [No] notice and opportunity to protest were ever afforded for people who might claim that the proposed retirement was not adequate to prevent impairment of existing rights. At the time the permit was issued, the particular rights to be retired were not identified, so that it would have been premature to argue that retirement would not prevent impairment. Yet at the time the retirement rights were identified and a notice of retirement was filed, it was too late to protest the permit and no one would have the right to protest the retirement.
>
> This failure to provide adequate notice and an opportunity to protest for people whose rights might be impaired by the permit-plus-retirement is a violation of those people's rights to procedural due process. Eldorado at Santa Fe, Inc. v. Cook, 113 N.M. 33, 36, 822 P.2d 672 (Ct. App. 1991) (failure to follow notice procedures violated water rights holders' due process rights); Nesbit v. City of

Albuquerque, 91 N.M. 455, 458, 575 P.2d 1340 (1977) (due process requires notice of zoning change which changes fundamental character of property).

1994 N.M. AG LEXIS 8, 17-18 (1994).

The need for members of the public to be able to evaluate a complete application to appropriate ground water was also explained by the State Engineer in his brief in the State Court of Appeals addressing the Original APR Application (Exhibit 4).[7] There, the State Engineer stated:

> Without the requirement of a complete, detailed and particularized application, the public is denied the information it needs to make an informed decision regarding whether to protest an application. Only with this information can existing water right owners determine whether their water rights may be impaired if a permit is issued. As previously noted, existing water right owners must demonstrate that they have standing in order to object to applications to appropriate groundwater. Section 72-12-3(D) confers standing only on water right owners (1) whose rights may be impaired by the granting of an application, and (2) who object on the grounds that granting the application will be contrary to the conservation of water within the state or detrimental to the public welfare of the state in the event if they can demonstrate that they will be "substantially and specifically affected by the granting of the application." (emphasis added). In addition, the rule governing application protests provides that "[a]ny person deeming that the granting of an application would be detrimental to his rights may protest in writing the proposal set forth in the application." 19.27.1.14 NMAC. This demands that every protest must set forth the reasons why an application should not be approved. *Id.*
>
> Thus, for a water right owner to analyze whether to expend resources and time to protest, applications must be sufficiently specific so that potential protestants can identify the reason for which they object to the application. Vague or incomplete applications deny water right owners the opportunity to make such an analysis and effectively deny them standing to object, since they cannot file sufficiently specific protests. 19.25.2 NM AC (03/11/1998, as amended through 08/30/2013).

Answer Brief of Appellee New Mexico State Engineer in New Mexico Court of Appeals case number 32,705 (Exhibit 4), pp. 32-33, emphasis in original.

---

[7] As is explained in the procedural history of the Corrected APR Application, APR appealed the District Court decision that dismissed the Original APR Application to the Court of Appeals.

As written, the Corrected APR Application fails to provide specific information about how much water APR might use or sell for a particular beneficial use, when it might use or sell this water, or where it might use or sell this water. Accordingly, the State Engineer must dismiss the Amended APR Application because he cannot issue any permit without denying water rights owners the information that they need to determine whether to file protests and without denying water rights owners procedural due process.

H. The Corrected APR Application must be dismissed because it seeks to monopolize water for speculative purposes.

1. New Mexico's system of prior appropriation does not permit hoarding water for speculation.

New Mexico's Constitution and laws confirm that all "unappropriated water" in this State "belong[s] to the public and [is] subject to appropriation for beneficial use," not just by a privileged few, but by everyone. N.M. Constitution, Article XVI, § 2. The requirement of beneficial use is based on "imperative necessity". State ex rel. Martinez v. City of Las Vegas, 2004-NMSC-009, ¶34, 135 N.M. 375, 386, citing Kaiser Steel Corporation v. W.S. Ranch Company, 1970-NMSC-043, ¶15, 81 N.M. 414, 417. This is the essence of prior appropriation, which is a system of law that "aims fundamentally at definiteness and certainty" and which "promotes the economical use of water." *Id.* No one is allowed to monopolize the resource, nor can anyone merely accumulate claims to future water use for purposes of speculation. Under New Mexico's prior appropriation system, beneficial use requires more than speculation. *See* Jicarilla Apache Tribe v. United States, 657 F.2d 1126, 1135 (10th Cir. 1981).

In the State ex rel. Martinez case, the New Mexico Supreme Court struck down the Pueblo Rights Doctrine, which purportedly granted the Town of Las Vegas a perpetual, unlimited right to take as much water from the Gallinas River as it needed. The Court held that

this claim could not prevail, because it was wholly at odds with the law of prior appropriation. *Id.*, 2004-NMSC-009, ¶36, 135 N.M. 375, 387.

In so holding, the Court decisively reversed its former majority opinion on the issue, expressed in Cartwright v. Public Service Company, 1958-NMSC-134, 66 N.M. 64, and embraced Justice Federici's dissent in that case. The Court stated:

> We therefore agree with the dissent in Cartwright that the ever-expanding quality of the Pueblo water right "is as antithetical to the doctrine of prior appropriation as day is to night".

State ex rel. Martinez v. City of Las Vegas, 2004-NMSC-009, ¶38, 135 N.M. 375.

In the dissent adopted by the Supreme Court in the Martinez case, Justice Federici explained the fundamental reasons that New Mexico and other arid states adopted the prior appropriation system:

> The reasons that the doctrine of prior appropriation was adopted in all of the western states except California were twofold. First, to utilize scarce water, and second to prohibit the monopoly inherent in the riparian doctrine.

Cartwright v. Public Service Company, 1958-NMSC-134, ¶129, 66 N.M. 64, 107 (on motion for rehearing; Frederici, J., dissenting).

Justice Federici continued:

> It was pointed out in *Albuquerque Land & Irrigation Company v. Gutierrez, 10 N.M. 177, 61 P. 357*, supra, there is no such thing as private ownership in the waters of public streams while so flowing. The appropriator acquires only the right to take from the stream a given quantity of water for a specified purpose, *Snow v. Abalos, 18 N.M. 681, 140 P. 1044*, supra. Many times this Court has held that the priority of right is based upon the intent to take a specified amount of water for a specified purpose and he can only acquire a perfected right to so much water as he applied to beneficial use. See, also, *Harkey v. Smith, 1926, 31 N.M. 521, 531, 247 P. 550, 553*, where this Court stated:
>
> "no 'dog in the manger' policy can be allowed in this state, unless these waters can be and are beneficially used by plaintiffs, the defendants or others may use the same."

Id., 1958-NMSC-134, ¶139, 66 N.M. 64, 109-110 (on motion for rehearing; Federici, J., dissenting).

Under the law of prior appropriation, APR cannot use its vague and indefinite Corrected APR Application to play "dog in the manger"[8] with respect to an enormous supply of water; nor can the State Engineer lawfully allow anyone to monopolize a vast public resource for speculative purposes.

This point also had been made by the New Mexico Supreme Court in the early case of Millheiser v. Long, 1900-NMSC-012, 10 N.M. 99. There, defendants Long and Truxton "took possession of a large ditch" that was capable of diverting the entire surface flow of the Rio Hondo in order to gain control over an entire water supply, not for their own use, but in hopes of selling water to third parties for profit. 1900-NMSC-012, ¶30, 10 N.M. at 116. They argued that their intent and ability to divert "all the water of the Rio Hondo" was sufficient under the law to create a right to own all of that water for the purpose of selling it to others. *Id.* Based on the principle of beneficial use, the Supreme Court disagreed:

> Under [the] construction of the law [advocated by Long and Truxton], the first person who diverts the water from the stream, may have a monopoly of all the water of any stream, by simply making this ditch large enough to conduct it from the usual channel. There need be but one appropriation, and all other settlers upon such stream must pay tribute to the person making the first diversion. This is not the law governing water rights in this Territory where the waters of natural streams are declared to be free to those who apply them to a beneficial use, until all are thus appropriated. Mr. McKinney in his work on irrigation has this to say on this subject:
>
> 'Under the later decisions relative to the capacity of the ditch being the limit of the extent of the appropriator's rights in and to the waters of a stream, it is held to be against the general policy of the entire modern system of the doctrine of appropriation that the greatest good shall accrue to the greatest number. For if

[8] This phrase refers to a person who prevents others from using something for which he has no need. The phrase also was used by the Seventh Judicial District Court to describe the Original APR Application. *See* District Court Memorandum (Exhibit 3), p. 24.

> this was the law upon the subject a person might lay claim to the water of whole rivers for the ostensible purpose of irrigating immense tracts of land, which with the utmost diligence would take years to accomplish; and although others might intervene and attempt to appropriate the water of a stream, they could only lay claim to it for a temporary period of time, and until the works of the first appropriator were eventually completed, and they would then be deprived of their appropriation.'

1900-NMSC-012, ¶30, 10 N.M. at 116-117.

Based on this analysis, the Supreme Court held that speculators could not transform the mere ability and desire to divert an entire stream into *de facto* ownership of that stream, because:

> Thus would the way for speculation and monopoly be opened and the main object of the law [of prior appropriation] defeated.

1900-NMSC-012, ¶31, 10 N.M. at 117.

As the Supreme Court held in Millheiser v. Long, the requirement of "beneficial use" prevents, and is intended to prevent, anyone from monopolizing an entire water supply for speculative purposes.

2. The Corrected APR Application seeks to appropriate water in order to hoard it for speculative purposes.

APR's failure to designate the specific elements of a water right in its Corrected APR Application violates the law governing applications as well as the fundamental principles of definiteness and certainty. Instead of designating a particular beneficial use in its Corrected APR Application, APR requests the State Engineer to grant it the option of selling or using water for any beneficial use. Instead of designating a particular place of beneficial use, APR requests the option of using water on its own lands or selling it to third parties for use anywhere on roughly 12 million acres. As a result, the amount of water requested by the Corrected APR Application is not based on a particular need for water at a particular place, but is instead merely a very large, arbitrary number that is based on something other than a beneficial use for the water.

APR is no different than Long and Truxton. In its Corrected APR Application, APR seeks to monopolize an entire water supply through its alleged ability to extract 54,000 acre feet per year of water via 37 deep, large-diameter wells, just as Long and Truxton sought to do the same through a large capacity ditch. Therefore, just as Long and Truxton sought to "have a monopoly of all the water in the stream" so that "all other settlers upon such stream must pay tribute to the person making the first diversion" (1900-NMSC-012, ¶30, 10 N.M. at 116), the Corrected APR Application seeks to monopolize the ground water in the San Augustin Basin so that APR can sell that water to others. However, the speculative intent to sell water to third parties, rather than applying it to one's own use, cannot establish a water right. 1900-NMSC-012, ¶¶30-31, 10 N.M. at 116-117. As a matter of law, hoarding water for possible future sales is not beneficial use.

I. The facial invalidity of the Corrected APR Application is confirmed by a comparison with the law of Colorado.

As the Tenth Circuit Court of Appeals pointed out in Lindsey v. McClure, 136 F.2d 65 (10th Cir. N.M. 1943), "Colorado and New Mexico have the same basic water law". 136 F.2d 65, 69. The Colorado Supreme Court's interpretation of Colorado water law therefore provides guidance for purposes of determining how New Mexico water law should be interpreted, and the Colorado Supreme Court has made clear that that appropriation of water for purposes of future unnamed uses is not consistent with the law of prior appropriation.

In Colorado River Water Conservation Dist. v. Vidler Tunnel Water Co., 197 Colo. 413, 594 P.2d 566 (1979), the Vidler Tunnel Water Company ("Vidler") applied for a "conditional water right" to divert and store water, not for its own beneficial use, but for potential future sales to third parties. A Colorado "conditional water right" is the "right to perfect a water right with a certain priority upon the completion with reasonable diligence of the appropriation upon which

such water right is to be based." *Id.*, 197 Colo. 413, 416, 594 P.2d 566, 567. In other words, a Colorado "conditional water right" is the equivalent of a New Mexico permit to appropriate water, and the ruling of the Colorado Supreme Court concerning the Vidler application for a "conditional water right" is therefore instructive. Addressing that application, the Colorado Supreme Court held:

> Our constitution guarantees a right to appropriate, not a right to speculate. The right to appropriate is for *use*, not merely for profit. As we read our constitution and statutes, they give no one the right to preempt the development potential of water for the anticipated future use of *others* not in privity of contract, or in any agency relationship, with the developer regarding that use. To recognize conditional decrees grounded on no interest beyond a desire to obtain water for sale would -- as a practical matter -- discourage those who have need and use for the water from developing it. Moreover, such a rule would encourage those with vast monetary resources to monopolize, for personal profit rather than for beneficial use, whatever unappropriated water remains. Twenty-five years ago this Court emphatically rejected the "claim that mere speculators, not intending themselves to appropriate and carry water to a beneficial use or representing others so intending, can by survey, plat, and token construction compel subsequent *bona fide* appropriators to pay them tribute by purchasing their claims in order to acquire a right guaranteed them by our Constitution." Denver v. Northern Colorado Water Dist., 130 Colo. 375, 408, 276 P.2d 992, 1009 (1954).

197 Colo, at 417, 594 P.2d at 568 (emphasis in original).

Moreover, in a later ruling, the Colorado Supreme Court made clear that it had not created a new doctrine unique to Colorado, but had merely applied the fundamental principles of prior appropriation. As the Court stated in City of Thornton v. Bijou Irrigation Company, 926 P.2d 1, 1996 Colo. LEXIS 492:

> Although Vidler has most often been cited as defining the anti-speculation doctrine, we did not articulate a new legal requirement in that case, but rather merely applied longstanding principles of Colorado water law.

926 P.2d at 37, 1996 Colo. LEXIS at 67.

Colorado later codified the anti-speculation doctrine in the Vidler case to provide that:

> [N]o appropriation of water, either absolute or conditional, can be held to occur when the proposed appropriation is based on the speculative sale or transfer of the appropriative rights to person not parties to the proposed appropriation; a speculative sale or transfer is evident where the appropriator does not have "a specific plan and intent to divert, store ... and control a specific quantity of water for specific beneficial uses.

Vermillion Ranch Ltd. Partnership v. Raftopoulos Brothers, 2013 Colo. 41, ¶34, 307 P.3d 1056, 1064, citing §§37-92-103(3)(a) and 37-92-103(3)(a)(I), C.R.S. (2012) (emphasis in original).

The Corrected APR Application is essentially the same as Vidler's application for a speculative conditional water right. In both cases, the applicant for the permit to appropriate water was not seeking to divert water for the applicant's own beneficial use. Rather, the applicant was speculating, hoping to make a profit by monopolizing a free public water supply and selling it to third parties. This has never been allowed under New Mexico law, or under the law of any other prior appropriation state, because it goes against the bedrock principles of prior appropriation and beneficial use. As a matter of law, therefore, the State Engineer cannot approve the Corrected APR Application and it must be dismissed.

J. The Corrected APR Application must be dismissed.

For all of the foregoing reasons, the Corrected APR Application violates New Mexico law governing appropriation of ground water. Therefore it must be dismissed.

III. The earlier decisions of the State Engineer and the District Court dismissing the Original APR Application require dismissal of the Corrected APR Application.

A. The Original APR Application was denied by the State Engineer.

The Original APR Application was filed in October of 2007, and amended in May of 2008. *See* District Court Memorandum (Exhibit 3), p. 2. More than 900 protests were filed in response to the Original APR Application and its May, 2008 amendment. *Id.*, p. 9. After a

hearing on a motion to dismiss the Application, the State Engineer Hearing Officer entered an Order Denying Application, which was approved by the State Engineer on March 20, 2012. *Id.*

The State Engineer's Denial Order indicates that the State Engineer dismissed the Original APR Application because it did not indicate the purpose or place of use of the water that APR proposed to appropriate. *See* State Engineer's Denial Order (Exhibit 1), pp. 2-5, ¶¶5-8, 18-26. Specifically, the State Engineer's Order stated:

> The face of the subject amended Application requests almost all possible uses of water, both at the [APR] Ranch location and at various unnamed locations within "Any areas within Catron, Sierra, Socorro, Valencia, Bernalillo, Sandoval and Santa Fe Counties that are situated within the geographic boundaries of the Rio Grande Basin ...," but does not identify a purpose of use at any one location with sufficient specificity to allow for reasonable evaluation of whether the proposed appropriation would impair existing rights or would not be contrary to the conservation of water within the state or would not be detrimental to the public welfare of the state.

Id., p. 2, ¶8.

The State Engineer's Denial Order also pointed out that the amount of water that APR sought to appropriate would be too much to use for irrigation of APR's ranch property, and that application of that amount of water to irrigate the APR ranch property "would be contrary to sound public policy." *Id.*, p. 3, ¶¶9-11. Finally, the State Engineer's Denial Order held that:

> To consider or approve an Application that, on its face, is so vague and overbroad that the effects of granting it cannot be reasonably evaluated is contrary to sound public policy.

Id., p. 4, ¶23.

B. <u>The State Engineer's denial of the Original APR Application was upheld by the Seventh Judicial District Court.</u>

APR appealed the State Engineer's Order to the Seventh Judicial District Court. District Court Memorandum (Exhibit 3), pp. 1, 14. The District Court ruled on that appeal on the basis of a motion for summary judgment filed by the Community Protestants. The Court issued the

District Court Memorandum (Exhibit 3) on November 14, 2012, and the District Court Order (Exhibit 2) on January 3, 2013. The District Court upheld the ruling of the State Engineer dismissing the Original APR Application. District Court Memorandum (Exhibit 3), p. 32; District Court Order (Exhibit 2) p. 1.

The District Court based its ruling on several grounds. First, the Court ruled that the Original APR Application failed to designate a beneficial use for the water to be appropriated and a place where the water would be used. District Court Memorandum (Exhibit 3), pp. 15-20. Second, the Court found that the Original APR Application did not specify what, if any, amounts of the water would be used to irrigate the APR ranch. *Id.*, pp. 20-21. Third, the Court ruled that the Original APR Application's lack of necessary information precluded the State Engineer from determining whether the proposed appropriation would impair existing water rights or be contrary to the public welfare or conservation of water. *Id.*, pp. 25-26. Finally, the Court ruled that the Original APR Application contradicted beneficial use of water as the basis of a water right and public ownership of water established by the New Mexico Constitution. *Id.*, pp. 26-32.

C. APR's appeal to the Court of Appeals was dismissed without a ruling on the merits.

APR appealed the District Court's ruling to the Court of Appeals, but that appeal was dismissed without a ruling on the merits. As is indicated in the Court of Appeals Order dated August 19, 2014 ("Court of Appeals Order")(Exhibit 5), the Court of Appeals determined that the appeal was moot and dismissed it on that basis. Court of Appeals Order (Exhibit 5), pp. 1-2.

D. The Corrected APR Application has not changed materially from the Original APR Application.

APR initially filed the Application that is the subject of this proceeding on July 14, 2014 and December 23, 2014. The Corrected APR Application was filed by APR on April 28, 2016.

Despite all of these filings, the fundamental nature of the Application has never changed, and the Corrected APR Application is the same in all material respects as the Original APR Application filed in 2007 and 2008.

1. The Corrected APR Application proposes to appropriate the same ground water that the Original APR Application proposed to appropriate.

The first feature of the Corrected APR Application that is essentially identical to the Original APR Application is the description of the ground water that is proposed to be appropriated. The notice of publication of the Original APR Application stated:

> The applicant [APR] proposes to drill 37 wells, all with 20-inch casing, and all approximately 2000 feet deep, to be located at coordinates described below in Catron County on land owned by the applicant. The applicant further proposes to divert and consumptively use 54,000 acre-feet of ground water per annum for domestic, livestock, irrigation, municipal, industrial, and commercial purposes of use ....

Notice of publication of the Original APR Application (Exhibit 6), p. 1.

The Corrected APR Application's Notice is essentially identical. It states:

> The applicant [APR] proposes to divert and consume 54,000 acre-feet per annum from 37 proposed wells, proposed to be drilled to depth of 2,000 feet, with 20-inch casing, on land owned by the applicant located as follows ...

Notice of publication of the Corrected APR Application (Exhibit 7), p. 1.

Second, although the two Applications use different terminology, the locations of all 37 of the wells to be used are the same in the Corrected APR Application and the Original APR Application. For example, the Corrected APR Application describes the third well's location as:

> Well RG-89943-POD3 (applicant's Well No. 3): 34 deg., 12 min., 58.177 sec. N latitude, 107 deg., 43 min., 47.907 sec. W longitude, within the NE ¼ SW ¼ SW ¼ of Section 13, Township 1 South, Range 9 West, NMPM.

Notice of publication of the Corrected APR Application (Exhibit 7), p. 1.

The Original APR Application describes the third well as being located at the same site:

> Well RG-89943-POD3 (applicant's Well No. 3): 34 degrees, 12 minutes, 58.177 seconds North Latitude, 107 degrees, 43 minutes, 47.907 seconds West Longitude.

Notice of publication of the Original APR Application (Exhibit 6), p. 1.

Similarly, the other 36 wells described in the Corrected APR Application are described as being located at the same sites as the other 36 wells described in the Original APR Application. *Compare* Notice of publication of Original APR Application (Exhibit 6) *with* Notice of Publication of Corrected APR Application (Exhibit 7).

2. The Corrected APR Application's descriptions of the purposes and places of use of the water at issue are virtually the same as the descriptions in the Original APR Application that have been ruled inadequate.

a. The Corrected APR Application provides only vague descriptions of the purpose and place of use for the water to be extracted.

The Corrected APR Application's approach to the locations where the ground water would be used and the purposes for which it would be used is extremely open-ended. The Corrected APR Application states:

> The water will be put to use by municipal, industrial and other users along the pipeline route shown on Exhibit D to Attachment 2. The water used for municipal purposes will be put to use within the authorized service areas of the municipalities listed in Attachment 2. The water used for bulk sales will be put to use by limited municipal and investor-owned utilities, commercial enterprises, and government agencies in parts of Catron, Sierra, Socorro, Valencia, Bernalillo, Sandoval and Santa Fe Counties as shown on Attachment 1 of Exhibit G.

Corrected APR Application, p. 3.

The Corrected APR Application therefore would include all sorts of conceivable end uses of water otherwise provided by existing municipal water providers as well as investor-owned utilities, industrial users, commercial enterprises, government agencies, and other users. As examples, these uses could include the domestic, livestock, irrigation, municipal, industrial, commercial, and other uses (including environmental, recreational, subdivision and related;

replacement and augmentation) that were listed in the Original APR Application. *See* p. 30, *infra.*

Attachment 2 to the Corrected APR Application states that the water will be used in Catron, Sierra, Socorro, Valencia, Bernalillo, Sandoval, and Santa Fe counties. Corrected APR Application, Attachment 2, Section III.3, page 3. Attachment 2 also states that APR intends to provide water for municipal purposes in one or more of the following municipalities:[9]

Municipal Entity	**Service Area**
Magdalena	Within the service area of the Village of Magdalena municipal water system
Socorro	Within the corporate limits of the City of Socorro
Belen	Within the service area of the City of Belen municipal water system in Valencia County, New Mexico
Los Lunas	Village of Los Lunas municipal water system service area
Albuquerque Bernalillo County Water Utility Authority	Service area of the Albuquerque Bernalillo County Water Utility Authority municipal water system
Rio Rancho	Town of Alameda Grant West of the Rio Grande and surrounding areas in Sandoval County

Corrected APR Application, Attachment 2, Section III.5.A, page 4 (footnotes omitted).

In addition, Section III.5.B of Attachment 2 indicates:

> Applicant [APR] plans to conduct commercial water sales in the parts of Catron, Sierra, Socorro, Valencia, Bernalillo, Sandoval, and Santa Fe counties that are situated within the geographic boundaries of the Rio Grande Basin ....

---

[9] As noted above, two of these governmental entities – Magdalena and Socorro – filed protests against the Corrected APR Application.

Corrected APR Application, Attachment 2, Section III.5.B, page 5.

b. The Original APR Application proposed to use the water to be extracted in the same large undefined area for a variety of purposes.

The Original APR Application's description of the proposed place of use of the water to be appropriated also had two descriptions of the proposed place of use of the ground water that APR proposed to extract. The first was:

> Within the exterior boundaries of Augustin Plans Ranch ("Ranch"), which is located in Catron County, New Mexico.

Original APR Application, May 5, 2008 filing, p. 5.

The second description of the proposed place of use was:

> Any areas within Catron, Sierra, Socorro, Valencia, Bernalillo, Sandoval, and Santa Fe Counties that are situated within the geographic boundaries of the Rio Grande Basin in New Mexico.

Id., p. 6.

The Original APR Application's description of the uses to which the water would be put was similarly open-ended. The Original APR Application indicated that the water would be used for domestic, livestock, irrigation, municipal, industrial, commercial, and other (including environmental, recreational, subdivision and related; replacement and augmentation). *Id.*, p. 1.

The Original APR Application indicated as well that:

> The purpose of this Amended Application is to provide water by pipeline to supplement or offset the effects of existing uses and for new uses in the areas designated in Attachment B, in order to reduce the current stress on the water supply of the Rio Grande Basin in New Mexico.

Id., p. 2.

c. The two Applications' open-ended descriptions of how the water to be appropriated would be used are essentially identical.

There is therefore essentially no difference between the open-ended descriptions of who would use the water to be appropriated and the purposes and places of use of that water in the Original APR Application and in the Corrected APR Application. Moreover, although the Corrected APR Application provides a blank example of a "long term water supply water agreement", it provides no information about who would use the water or the purpose or place of use of that water. *See* sample contract, Corrected APR Application, Attachment 2, Exhibit F.

E. The State Engineer's Office is conducting the current proceeding as a continuation of the proceeding addressing the Original APR Application.

Finally, the Office of the State Engineer is treating the proceeding to consider the Corrected APR Application as a continuation of the State Engineer's Office proceeding addressing the Original APR Application in two ways. First, the State Engineer's Office filed the Corrected APR Application under the same number (RG-89943) as the Original APR Application. Second, the State Engineer's Office determined that any protest filed in response to the Original APR Application would also apply to the Corrected APR Application. The notice of publication of the Corrected APR Application states:

> In the event that a party filed a timely written protest or objection to the original Application to Appropriate RG-89943, filed with the State Engineer on October 12, 2007 and May 5, 2008, it is not necessary to file an additional written protest. Those protests or objections are considered timely for this corrected application and notice of publication.

Notice of Corrected APR Application for publication (Exhibit 7), p. 4.

F. The rulings of the State Engineer and the District Court dismissing the Original APR Application require that the Corrected APR Application be dismissed.

Regardless of whether this case is a continuation of the earlier proceeding or a new matter, the earlier decisions of the State Engineer and the District Court dismissing the Original

APR Application require the State Engineer to dismiss the Corrected APR Application. If this proceeding is a continuation of the earlier proceeding addressing the Original APR Application, dismissal of the Corrected APR Application is required by the doctrine of the law of the case. If this proceeding is separate from the earlier proceeding, dismissal of the Corrected APR Application is required by the doctrines of *res judicata* and collateral estoppel.

1. If this proceeding is a continuation of the earlier proceeding, approval of the Corrected APR Application is barred by the law of the case.

a. The law of the case is binding on the subsequent proceedings following a ruling on appeal.

The law of the case doctrine was explained by the New Mexico Court of Appeals in Badilla v. Wal-Mart Stores East, Inc., 2017-NMCA-021, 389 P.3d 1050. The Court stated:

> What amounts in effect to an adjudication of the issue on a prior appeal, right or wrong, has become the ***law of the case***, and is binding alike upon us and the litigants in all subsequent proceedings in the case.

2017-NMCA-021, ¶5, 389 P.3d 1053, quoting Varney v. Taylor, 1968-NMSC-189, ¶9, 79 N.M. 652 (emphasis in original; quotation marks and parentheses omitted).

A ruling in a case on appeal therefore becomes the law of the case in subsequent proceedings in the case, and that law of the case is binding on the lower tribunal and on the litigants in those subsequent proceedings.

b. This proceeding addressing the Corrected APR Application is a continuation of the earlier proceedings addressing the Original APR Application.

As was explained above, the State Engineer dismissed the Original APR Application, and that dismissal was appealed by APR to the District Court. The District Court upheld the dismissal of the Original APR Application. Although the District Court did not remand the case to the State Engineer, the State Engineer's Office is treating this proceeding as a continuation of

the proceeding addressing the Original APR Application by filing the Corrected APR Application under the same number (RG-89943) as the Original APR Application and by providing that any protest filed in response to the Original APR Application also applies to the Corrected APR Application.

c. The District Court's ruling dismissing the Original APR Application is the law of the case, and it requires the State Engineer to dismiss the Corrected APR Application.

The State Engineer dismissed the Original APR Application because it did not provide information, including a beneficial use for the water to be appropriated, required for the State Engineer to evaluate an application to appropriate water. Rather, the Application indicated that the water to be appropriated could be put to almost any use. *See* State Engineer's Denial Order (Exhibit 1), pp. 2-5, ¶¶5-11, 18-26. The District Court affirmed the dismissal of the Original APR Application on the grounds that the Application failed to provide a beneficial use to which the water would be put, that the Application did not specify the lands to be irrigated with any water to be used for irrigation, and that granting the Application would be contrary to the public ownership of water in New Mexico. District Court Memorandum (Exhibit 3), pp. 15-32.

Because the State Engineer considers this matter a continuation of the earlier proceedings on the Original APR Application, the District Court's ruling that the Original APR Application was invalid is the law of the case. That ruling therefore is binding on the State Engineer in his consideration of the Corrected APR Application. Moreover, that ruling indicates that the State Engineer must dismiss the Corrected APR Application.

As was explained earlier, the Corrected APR Application is identical to the Original APR Application in all material respects. Like the Original APR Application, the Corrected APR Application fails to designate a beneficial use for the water to be appropriated and allows for all

possible uses to which the water might be put. The Corrected APR Application also fails to indicate specifically where the water to be appropriated would be used, instead listing multiple counties from Catron county to Santa Fe county as the possible locations for use of the water. The Corrected APR Application fails as well to indicate where any water to be used for irrigation would be used, and who would be the owner of the land to be irrigated. The Corrected APR Application also lacks the information that is required for the State Engineer to provide due process for individuals and entities that may protest the proposed appropriation and for the State Engineer to determine whether the proposed appropriation would cause impairment or be contrary to conservation of water or the public welfare.

The Corrected APR Application therefore has the same defects as the Original APR Application, and the reasoning of the District Court that was the basis for the ruling dismissing the Original APR Application applies equally to the Corrected APR Application because the District Court's ruling is the law of the case. The District Court's legal analysis of the facts and its conclusions of law are binding on the State Engineer, and they require dismissal of the Corrected APR Application.

2. The doctrine of *res judicata* bars approval of the Corrected APR Application if this proceeding is not a continuation of the earlier proceeding addressing the Original APR Application.

The State Engineer's Office appears to be treating this proceeding as a continuation of the earlier proceeding on the Original APR Application. However, even if the State Engineer's Office determines that this proceeding is not a continuation of the earlier proceeding, the doctrine of *res judicata* requires the State Engineer to dismiss the Corrected APR Application.

a. *Res judicata* bars the filing of a claim that has already been litigated.

The doctrine of *res judicata*, which bars the filing of the same claim twice, is intended:

> to promote judicial efficiency and finality by giving a litigant only one full and fair opportunity to litigate a claim and by precluding any later claim that could have, and should have, been brought as part of the earlier proceeding.

Tafoya v. Morrison, 2017-NMCA-025, ¶32, 389 P.3d 1098, 1107, (quotation marks and citation omitted).

The doctrine of *res judicata* is applicable when a suit is filed after the conclusion of earlier litigation addressing the same matter, and several conditions are met. First, the parties to the two claims must be the same or in privity. Second, the subject matter must be the same. Third, the capacity or character of persons for or against whom the claim is made must be the same. Fourth, the same cause of action must be involved in both suits. Myers v. Olson, 1984-NMSC-015, ¶9, 100 N.M. 745, 747. Fifth, there must have been a final decision in the first proceeding. Sixth, the final decision in the first proceeding must have been on the merits. Tafoya v. Morrison, 2017-NMCA-025, ¶32, 389 P.2d 1098, 1107. Finally, the party against whom the doctrine of *res judicata* is invoked must have had a full and fair opportunity to litigate the issues involved in the first proceeding. In this matter, all of these conditions are met.

b. The doctrine of *res judicata* bars the Amended APR Application.

i. The parties in the current proceeding and the earlier proceeding are the same.

The same parties are involved in this proceeding as were involved in the proceeding addressing the Original APR Application. APR was the applicant in the earlier proceeding. *See* State Engineer's Denial Order (Exhibit 1), p.1 and District Court's Memorandum (Exhibit 3), p.1. APR also is the applicant in the current proceeding. *See* Corrected APR Application (stamped July 14, 2014 by the State Engineer's Office), p.1. In addition, many of the protestants in the proceeding concerning the Original APR Application are also protestants in this proceeding. *Compare* Client List attached as Exhibit A to the New Mexico Environmental Law

Center's Entry of Appearance dated August 26, 2010 (Exhibit 8)[10] *with* protestants listed on p. 47 *infra*. Although some of the protestants in the earlier proceeding are not protestants in this matter (because they have died or moved), the vast majority of the individuals who protested the Original APR Application also have protested the Corrected APR Application.

ii. This proceeding addressing the Corrected APR Application involves the same subject matter as the earlier proceeding addressing the Original APR Application.

The second requirement that must be met for the doctrine of *res judicata* to apply is that the two proceedings at issue must both address the same subject matter. Here, the proceeding addressing the Original APR Application and this proceeding addressing the Corrected APR Application both involve the effort by APR to appropriate 54,000 acre feet of ground water per year from the San Augustin Basin. Moreover, the issues raised by that proposed appropriation are the same in this proceeding addressing the Corrected APR Application as they were in the earlier proceeding addressing the Original APR Application.

The issue that was litigated in the earlier proceeding addressing the Original APR Application was the failure of that Application to provide information required for the State Engineer to be able to approve an application to appropriate water. This information included, among other items, a beneficial use for the very large amount of water that APR proposes to appropriate, the place where the water to be appropriated would be used, and, with respect to possible use of the water for irrigation, where the irrigation would occur. The State Engineer determined that the Original APR Application had to be dismissed in the earlier proceeding because the Application failed to specify a purpose or place of use of the water that APR sought to appropriate. *See* State Engineer's Denial Order (Exhibit 1), pp. 2-5, ¶¶5-8, 18-26. That also

[10] The Entry of Appearance attached as Exhibit 8 does not include the lengthy certificate of service that was filed with the Entry of Appearance.

was the basis on which the District Court upheld the State Engineer's dismissal of the Original APR Application. *See* District Court's Memorandum (Exhibit 3) pp. 14-32.

As was explained above, the Corrected APR Application also fails to provide this information. The open-ended list of possible users of the water to be appropriated is essentially identical in the Corrected APR Application to the comparable list in the Original APR Application. The Corrected APR Application's vague description of possible uses for the water is also virtually identical to the comparable descriptions in the Original APR Application. In addition, the Corrected APR Application's descriptions of the wells that would be used to extract the ground water to be appropriated are the same as the comparable descriptions in the Original APR Application. Finally, although the language used in the two Applications differs, the locations of the wells to be used for extraction of ground water in the Corrected APR Application are the same as the locations of the wells described in the Original APR Application.

The subject matter of this proceeding addressing the Corrected APR Application therefore is the same as the subject matter that was addressed in the earlier proceeding addressing the Original APR Application.

iii. The capacity and character of APR are the same in this proceeding as it was in the earlier proceeding addressing the Original APR Application.

The third requirement that must be met for the doctrine of *res judicata* to apply is that the capacity or character of the party against whom the doctrine is invoked must be the same in the current proceeding as it was in the earlier proceeding. Here, the Community Protestants allege that the doctrine of *res judicata* should be applied against APR. APR is involved in this proceeding addressing the Corrected APR Application in its capacity as the applicant for a permit to appropriate 54,000 acre feet of water per year from the San Augustin Basin. *See*

Corrected APR Application (stamped July 14, 2014 by the State Engineer's Office), p.1. That is exactly the same capacity in which APR was involved in the earlier proceeding addressing the Original APR Application. *See* State Engineer's Denial Order (Exhibit 1), p.1, District Court's Memorandum (Exhibit 3), p.1. Therefore, the party against whom the Community Protestants seek to invoke the doctrine of *res judicata* – APR – is involved in this proceeding addressing the Corrected APR Application in the same capacity as APR was involved in the earlier proceeding addressing the Original APR Application.

iv. This proceeding addressing the Corrected APR Application involves the same cause of action as was involved in the proceeding addressing the Original APR Application.

The cause of action that is involved in this proceeding addressing the Corrected APR Application is the same cause of action that was involved in the earlier proceeding addressing the Original APR Application. The basis of each proceeding is the facial deficiency of an application by APR for a permit to appropriate 54,000 acre feet of water a year from the San Augustin Basin. *See* State Engineer's Denial Order (Exhibit 1), p.1, District Court's Memorandum (Exhibit 3), p.1, and Corrected APR Application (stamped July 14, 2014 by the State Engineer's Office), p.1. The underlying causes of action therefore are the same in the earlier proceeding addressing the Original APR Application and in this proceeding addressing the Corrected APR Application.[11]

v. The earlier proceeding addressing the Original APR Application ended with two final decisions.

The fifth requirement that must be met for the application of the doctrine of *res judicata* is that the first proceeding must have concluded with a final decision. Here, the Original APR

[11] In addition, the Community Protestants filed a motion to dismiss the Original APR Application in the earlier proceeding, and they have filed a similar motion in this proceeding addressing the Corrected APR Application.

Application was the subject of two final decisions. The first final decision was by the State Engineer, who dismissed the Original APR Application. *See* State Engineer's Denial Order (Exhibit 1), p. 5. The second final decision was entered by the District Court after APR appealed the State Engineer's Denial Order. *See* District Court's Memorandum (Exhibit 3), p. 32; and District Court's Order (Exhibit 2), p. 1. Neither of these decisions was an interlocutory or interim decision; each of them was a final decision disposing of the Original APR Application.

vi. Both of the final decisions denying the Original APR Application were decisions on the merits.

The sixth requirement for the doctrine of *res judicata* to apply is that the final decision in the earlier proceeding must have been on the merits. Each of the final decisions in the earlier proceeding addressing the Original APR Application was on the merits because each decision determined that the Original APR Application was invalid on its face.

The State Engineer's Denial Order dismissed the Original APR Application for several reasons. First, the State Engineer ruled that the Application was deficient because it did not indicate the purpose or place of use of the water that APR proposed to appropriate. *See* State Engineer's Denial Order (Exhibit 1), pp. 2-5, ¶¶5-8, 18-26. Second, the State Engineer ruled that the Original APR Application's lack of specificity did not permit a reasonable evaluation of whether the proposed appropriation would impair existing uses of water or would be contrary to the public welfare or conservation of water. *Id.*, p. 2, ¶8. Third, the State Engineer's Order pointed out that the amount of water that APR sought to appropriate would be too much to use for irrigation of APR's ranch property, and that application of that amount of water to irrigate the APR ranch property "would be contrary to sound public policy." *Id.*, p. 3, ¶¶9-11. Finally, the State Engineer's Order held that the Original APR Application was so "vague and overbroad" that granting it would be "contrary to sound public policy". *Id.*, p. 4, ¶23.

On appeal, the District Court upheld the State Engineer's Order dismissing the Original APR Application, and the District Court's ruling also was based on the merits. First, the District Court ruled that the Original APR Application failed to comply with the statutory and judicial requirements that an application to appropriate ground water must designate a beneficial use for the water to be appropriated and a place where the water would be used. District Court Memorandum (Exhibit 3), pp. 15-20. Second, the District Court found that the Original APR Application did not specify what, if any, amounts of the water to be appropriated would be used for irrigation. *Id.*, pp. 20-21. Third, the District Court ruled that the Original APR Application's lack of necessary details made it impossible for the State Engineer to determine whether the proposed appropriation would impair existing water rights or be contrary to the public welfare or conservation of water. *Id.*, pp. 25-26. Finally, the District Court ruled that the Original APR Application contradicted beneficial use of water as the basis of a water right and public ownership of water established by the New Mexico Constitution. *Id.*, pp. 26-32.

Each of these rulings by the State Engineer and the District Court addressed the merits of the sufficiency of the Original APR Application. Neither of these rulings was addressed to a matter other than the merits, such as the standing of a party or the timeliness of a filing. Rather, each of these rulings was based on the failure of the Original APR Application to comply with substantive requirements pertaining to applications to appropriate ground water. The earlier proceedings addressing the Original APR Application therefore were decided on the merits.

vii. <u>APR had a full and fair opportunity to litigate the issues involved in the earlier proceeding addressing the Original APR Application.</u>

Finally, the Courts also have ruled that the doctrine of *res judicata* applies only if the party against whom it is to be applied had a full and fair opportunity to litigate the issues

involved in the first proceeding at issue. *See, e.g.*, Myers v. Olson, 1984-NMSC-015, ¶8, 100 N.M. 745, 747; Tafoya v. Morrison, 2017-NMCA-025, ¶32, 389 P.3d 1098, 1107. There can be no question that APR had a full and fair opportunity in the earlier proceeding addressing the Original APR Application.

APR participated and was represented by counsel[12] in the proceeding addressing the Original APR Application. *See* State Engineer's Order (Exhibit 1), p. 1. APR also initiated the appeal to the District Court (*see* caption, District Court Memorandum (Exhibit 3), p.1) and responded to the Community Protestants' motion for summary judgment. *See, e.g.*, District Court Memorandum, pp. 15-16, 25-26. In addition, APR filed a sur-reply presenting arguments against the Community Protestants' Motion for Summary Judgment. *Id.*, p. 30.

It is clear from the State Engineer's Order and the District Court's Memorandum that APR had a full and fair opportunity to litigate concerning the Original APR Application. For that reason, and because the other requirements for application of the *res judicata* doctrine are met, that doctrine requires the State Engineer to dismiss the Corrected APR Application.

3. In the alternative, the doctrine of collateral estoppel mandates dismissal of the Corrected APR Application.

a. The doctrine of collateral estoppel bars re-litigation of issues that have been decided.

The doctrine of collateral estoppel was explained by the New Mexico Court of Appeals in Contreras v. Miller Bonded, Inc., 2014-NMCA-011, 316 P.3d 202. There, the Court stated:

> The doctrine of collateral estoppel fosters judicial economy by preventing the relitigation of ultimate facts or issues actually and necessarily decided in a prior suit.

[12] In addition, APR's counsel is the same in this proceeding as in the earlier proceeding addressing the Original APR Application. In both proceedings, APR has been represented by John Draper of Draper & Draper and Jeffrey Wechsler of Montgomery & Andrews.

2014-NMCA-011, ¶14, 316 P.3d 202, 206, quoting Shovelin v. Central N.M. Electric Cooperative, 1993-NMSC-015, ¶10, 115 N.M. 293.

The Court of Appeals also pointed out in that case that determinations by administrative agencies can have preclusive effect pursuant to the doctrine of collateral estoppel:

> [A]dministrative adjudicative determinations may be given preclusive effect if rendered under conditions in which the parties have the opportunity to fully and fairly litigate the issue at the administrative hearing.

Id., quoting Shovelin v. Central N.M. Electric Cooperative, 1993-NMSC-015, ¶12.

The doctrine of collateral estoppel therefore applies to the ruling of the State Engineer dismissing the Original APR Application as well as to the decision of the District Court affirming the State Engineer's ruling. *Id.*

Finally, the Court of Appeals listed the four requirements that must be met for collateral estoppels to be applicable. The Court stated:

> [T]he moving party must demonstrate that (1) the party to be estopped was a party to the prior proceeding, (2) the cause of action in the case presently before the court is different from the cause of action in the prior adjudication, (3) the issue was actually litigated in the prior adjudication, and (4) the issue was necessarily determined in the prior litigation.

2014-NMCA-011, ¶15, 316 P.3d. 207.

b. The doctrine of collateral estoppel bars approval of the Corrected APR Application.

i. The party against whom collateral estoppel is invoked was a party in the earlier proceeding.

The first requirement for collateral estoppel to apply is that the party against whom the doctrine of collateral estoppel is sought to be invoked must be the same in the two proceedings. The party against whom collateral estoppel is asserted is APR. As was pointed out earlier, APR was the applicant in the earlier proceeding before the State Engineer. *See* the State Engineer's

Denial Order (Exhibit 1), p.1. APR also was the appellant in the litigation in the District Court that resulted in the District Court's ruling affirming the State Engineer's dismissal of the Original APR Application. *See* the District Court's Memorandum (Exhibit 3) p.1. Finally, APR is the applicant in the current proceeding. *See* Corrected APR Application, p.1. Therefore the requirement that the party against whom collateral estoppel is sought to be invoked must have been a party in the previous proceeding is met.

ii. This proceeding is a separate proceeding from the proceeding addressing the Original APR Application.

If this proceeding addressing the Corrected APR Application is not a continuation of the earlier proceeding addressing the Original Application, the cause of action in this proceeding may be viewed as being different than the cause of action in the earlier proceeding because they address separate applications filed by APR. In that event, the second requirement of collateral estoppel is met because the cause of action in this proceeding and the cause of action in the earlier proceeding addressing the Original APR Application are different.

iii. The issue raised by the Community Protestants was actually litigated in the earlier proceeding addressing the Original APR Application.

The third requirement for collateral estoppel to apply is that the issue involved in the current proceeding must actually have been litigated in the earlier proceeding. The issue that was litigated in the earlier proceeding addressing the Original APR Application was the failure of the Original APR Application to provide information required for the State Engineer to be able to approve an application to appropriate water. This information included, among other items, a beneficial use for the very large amount of water that APR proposed to appropriate, the place where the water to be appropriated would be used, and, with respect to possible use of the water for irrigation, where the irrigation would occur. The State Engineer dismissed the Original

APR Application because the Application failed to provide this and other information. *See* State Engineer's Denial Order (Exhibit 1), pp. 2-5, ¶¶5-8, 18-26. That also was the basis on which the District Court upheld the State Engineer's dismissal of the Original APR Application. *See* District Court's Memorandum (Exhibit 3) pp. 14-32.

This is also one of the grounds on which the Community Protestants seek to have the State Engineer dismiss the Corrected APR Application. As is explained above, the Corrected APR Application fails to provide this information because it is identical in all material respects to the Original APR Application. The open-ended list of possible users of the water to be appropriated is essentially identical in the Corrected APR Application and the Original APR Application.

In addition, the Corrected APR Application's vague list of possible uses for the water is virtually identical to the comparable descriptions in the Original APR Application. Moreover, the Corrected APR Application's descriptions of the ground water to be appropriated are the same as the comparable descriptions in the Original APR Application, and although the language used in the two Applications differs, the locations of the wells to be used for extraction of ground water in the Corrected APR Application are the same as the locations of the wells described in the Original APR Application. For these reasons, the issues raised by the Protestants' Motion for Summary Judgment were litigated in the earlier proceeding.

iv. The earlier proceeding necessarily determined that the Original APR Application was invalid because it did not specify the purpose or place of use of the water at issue.

Finally, the issue in this matter is whether the Corrected APR Application is invalid because it fails to state the purpose or place of use of the water that APR proposes to appropriate. That is the issue that was necessarily determined in the earlier proceedings concerning the

Original APR Application. The State Engineer dismissed the Original APR Application because it did not indicate the purpose or place of use of the water that APR proposed to appropriate. *See* State Engineer's Denial Order (Exhibit 1), pp. 2-5, ¶¶5-8, 18-26. The District Court upheld the State Engineer's dismissal of the Original APR Application on the same basis. *See* District Court's Memorandum (Exhibit 3) pp. 14-32.

Because all of the requirements for collateral estoppel are met, that doctrine requires the State Engineer to dismiss the Corrected APR Application.

Conclusion

The State Engineer must dismiss the Corrected APR Application because it is invalid on its face. The Corrected APR Application fails to designate a beneficial use for the water that APR seeks to appropriate and fails to provide other information that is required by applicable statutes and regulations for an application to appropriate ground water .

Alternatively, the State Engineer is required to dismiss the Corrected APR Application because the State Engineer is bound by the earlier rulings of the State Engineer and the Seventh Judicial District Court dismissing the Original APR Application.

On the basis of either of these alternative grounds, the Community Protestants are entitled to an order granting them summary judgment dismissing the Corrected APR Application.

Dated: September 26, 2017.

NEW MEXICO
ENVIRONMENTAL LAW CENTER

Douglas Meiklejohn
Jaimie Park
Jonathan Block
Eric Jantz
1405 Luisa Street, Suite #5
Santa Fe, NM 87505
Telephone: (505) 989-9022
Facsimile: (505) 989-3769
Electronic mail: dmeiklejohn@nmelc.org,
jpark@nmelc.org

Attorneys for the Community Protestants
listed on the following page.

Attorneys for the following Protestants:

Gladys Baca; Robert and Mona Bassett; Patti BearPaw; Sue Berry-Fox; Ann Boulden; Donald and Joan Brooks; Jack Bruton and Bruton Ranch, LLC; Lisa Burroughs and Thomas Betras, Jr.; Charles and Lucy Cloyes; Michael D. Codini, Jr.; Randy Coil; James and Janet Coleman; Terri Cook; Thomas A. Cook; Wildwood Highlands Landowners Association and its members; Randy Cox; Nancy Crowley; Tom Csurilla and Elk Ridge Pass Development Company, LLC and Top of the World Land Company, LLC; Roger and Jeanne Daigger; Michael and Ann Danielson; Bryan and Beverley Dees; John and Eileen Dodds; Louise and Leonard Donahe; Patricia Eberhardt; Roy Farr; Paul and Rose Geasland; Gila Conservation Coalition, Center for Biological Diversity and Gila Watershed Alliance; Mary Rakestraw Greiert; Michael Hasson; Don and Cheryl Hastings; Gary and Carol Hegg; Patricia Henry; Catherine Hill; Eric Hofstetter; Sandy How; M. Ian and Margreet Jenness; Amos Lafon; Marie Lee; Cleda Lenhardt; Rick and Patricia Lindsey; Victoria Linehan; Owen Lorentzen; Mike Loya; Sonia Macdonald; Robert and Susan MacKenzie; Douglas Marable; Thea Marshall; Sam and Kristin McCain; Jeff McGuire; Michael Mideke; Kenneth Mroczek and Janice Przylbyl Mroczek; Peter Naumnik; John Naumnik; Regina Naumnik; Robert Nelson; Veronika Nelson; Walter and Diane Olmstead; Karl Padgett; Max Padget; Leo Padgett; Patricia Padgett; Wanda Parker; Ray and Carol Pittman; John Preston and Patricia Murray Preston; Daniel Rael; Stephanie Randolph; Mary Katherine Ray; Kenneth Rowe; Kevin and Priscilla Ryan; Ray and Kathy Sansom; Christopher Scott Sansom; John and Betty Schaefer; Susan Schudardt; Janice Simmons; Jim Sonnenberg; Anne Sullivan; Margaret and Roger Thompson; Gloria Weinrich; James Wetzig and Maureen M. MacArt; Donald and Margaret Wiltshire; and the following two associations and their members: Homestead Landowners Association and its members, including but not limited to the following: Joseph and Janet Siomiak, Patricia Germain, Bette Dugie, Jonathan Benedict, Michael Murray, John Pohl, Parker Fillion, Barbara Owens; and Abbe Springs Homeowners Association and its members, including but not limited to the following: Raven Reitstetter, Nancy Crowley, Chris and Helen Dossett, Kristin Ekvall, Kenneth and Diana Fry, Albert Goodman, William Gysin, Jeff McGuire, Rozalyn Murphy, Janice Simmons, Ronald Wilson, Paul G. Kotula, Karl and Jane Mears, Thomas and Linda Pampinella, David P. Smith, Carmela L. Warner, Lisa Burroughs, and Tom Betras.

BEFORE THE NEW MEXICO STATE ENGINEER

IN THE MATTER OF THE APPLICATION BY AUGUSTIN PLAINS RANCH, LLC FOR PERMIT TO APPROPRIATE GROUNDWATER IN THE RIO GRANDE UNDERGROUND WATER BASIN OF NEW MEXICO	)))))	**Hearing No. 09-096** **OSE File No. RG-89943**

ORDER DENYING APPLICATION

This matter came on before Andrew B. Core, the State Engineer's designated Hearing Examiner, at a hearing held on February 7, 2012, in Courtroom 1 of the Socorro County Courthouse in Socorro, New Mexico to consider a Motion to Dismiss Application (Motion 1), filed by a group of approximately 80 Protestants represented by New Mexico Environmental Law Center (ELC Group) on February 11, 2011 and a Motion to Dismiss Application for Permit to Appropriate Underground Water (Motion 2), filed by Protestant Middle Rio Grande Conservancy District (MRGCD) on February 11, 2011. The parties appeared as follows: John B. Draper, Esq., and Jeffrey J. Wechsler, Esq., represented Applicant Augustin Plains Ranch, LLC (Ranch); R. Bruce Fredrick, Esq., represented Protestant ELC Group; Steven Hernandez, Esq., represented Protestant MRGCD; Jennifer M. Anderson, Esq., represented Protestant Kokopelli Ranch, LLC; Kate Hoover represented Protestant Navajo Nation; Seth Fullerton, Esq., represented Protestant Last Chance Water Co.; George Chandler, Esq., represented Protestant Monticello Community Ditch Association; Janis E. Hawk, Esq., represented Protestant Pueblo of Acoma; Christopher Shaw, Esq., represented Protestant NM Interstate Stream Commission; Samuel D. Hough, Esq., represented Protestant Pueblo of Santa Ana; Richard Mertz, Esq., represented Protestant University of New Mexico; Sherry J. Tippett, Esq., represented Protestants Luna Irrigation Ditch, Cuchillo Valley Acequia Association and Salomon J. Tafoya; Ron Shortes, Esq., represented Protestants Shortes XX Ranch, Board of County Commissioners for Catron County, Sandra Carol Coker, Ronald Goecks, Cynthia S. Lee, John Pemberton, Darnell & Montana Pettis, and the Walkabout Creek Ranch; and Stacey J. Goodwin, Esq., and Jonathan Sperber, Esq., represented the Water Rights Division of the Office of the State Engineer.

During the period from February 15, 2011 to May 17, 2011, several parties to the captioned matter each filed briefs questioning the adequacy of the Application, joinders to the motions to dismiss, responses to the motions to dismiss, and replies to the responses. Having examined all of the pleadings and considering the arguments presented at hearing, the Hearing Examiner finds the following and recommends to the State Engineer the following Order denying the subject Application.

1. The State Engineer has jurisdiction of the parties and subject matter.
2. The jurisdiction of the State Engineer is invoked pursuant to Articles 2, 5 and 12 of Chapter 72 NMSA 1978.
3. The relief sought by Motion 1 and Motion 2 are, in effect, the same.
4. A separate hearing for each of the motions is unwarranted.
5. NMSA section 72-12-3(A) states (in relevant parts): "In the application, the applicant **shall** designate: ...(2) the beneficial use to which the water will be applied; and ...(6) the place of use for which the water is desired; and...(7) if the use is for irrigation, the description of the land to be irrigated and the name of the owner of the land." (emphasis added)
6. NMSA section 72-12-7(C) states (in relevant part): "If objections or protests have been filed within the time prescribed in the notice or if the state engineer is of the opinion that the permit should not be issued, the state engineer may deny the application...."
7. NMSA section 72-5-7 states (in relevant part): "[The state engineer] may also refuse to consider or approve any application or notice of intention to make application ... if, in his opinion, approval would be contrary to the conservation of water within the state or detrimental to the public welfare of the state."
8. The face of the subject amended Application requests almost all possible uses of water, both at the Ranch location and at various unnamed locations within "Any areas within Catron, Sierra, Socorro, Valencia, Bernalillo, Sandoval and Santa Fe Counties that are situated within the geographic boundaries of the Rio Grande Basin...," but does not identify a purpose of use at any one location with sufficient specificity to allow for reasonable evaluation of whether the proposed appropriation would impair existing rights or would not be contrary to the

conservation of water within the state or would not be detrimental to the public welfare of the state.

9. The Notice of Publication for the subject amended Application suggests that 4,440 acres of land on the Ranch property would be irrigated from the proposed 37 wells, but applying the requested 54,000 acre-feet per year of proposed diversion to that acreage would result in a crop irrigation requirement (CIR) of approximately 12.16 acre-feet of water per acre per year.

10. Within the Rio Grande Underground Water Basin, the usual administrative practice of the State Engineer is to recognize a CIR of 3 acre-feet of water per acre per year diversion.

11. Applying 12.16 acre-feet of water per acre per year to any land within the Rio Grande Underground Water Basin would be contrary to sound public policy.

12. Attachment B to the subject Application states (in relevant part): "there are extraordinary potential uses of the water that could support the State of New Mexico as a whole. These include providing water to the State of New Mexico to augment its capacity to meet compact deliveries to the State of Texas on the Rio Grande at Elephant Butte dam."

13. The New Mexico Interstate Stream Commission is the only entity authorized to administer "compact deliveries to the State of Texas on the Rio Grande at Elephant Butte dam."

14. The New Mexico Interstate Stream Commission is not a co-applicant to the subject Application.

15. Attachment B to the subject Application states (in relevant part): "Preliminary studies indicate the water resources could be utilized to support municipalities in the region, including Datil, New Mexico, Magdelena, New Mexico and Socorro, New Mexico."

16. Of the listed municipalities, none is a co-applicant to the subject Application.

17. An application is, by its nature, a request for final action.

18. It is reasonable to expect that, upon filing an application, the Applicant is ready, willing and able to proceed to put water to beneficial use.

19. The statements on the face of the subject Application make it reasonably

doubtful that the Applicant is ready, willing and able to proceed to put water to beneficial use.

20. The face of the subject Application does not make it clear whether irrigation is contemplated only on any lands within the Ranch, or at some other, unnamed, locations.

21. Consideration of an application that lacks specificity of purpose of the use of water or specificity as to the actual end-user of the water would be contrary to sound public policy.

22. Consideration of an application to pump groundwater from a declared underground water basin which will then be released into a natural stream or watercourse without specific identification of delivery points and methods of accounting for that water would be contrary to sound public policy.

23. To consider or approve an Application that, on its face, is so vague and overbroad that the effects of granting it cannot be reasonably evaluated is contrary to sound public policy.

24. In keeping with NMSA section 72-5-7, Application RG-89943, filed with the State Engineer on October 12, 2007 and on May 5, 2008, should not be considered by the State Engineer.

25. Application RG-89943, filed with the State Engineer on October 12, 2007 and on May 5, 2008, should be denied without prejudice to filing of subsequent applications.

26. Hearing 09-096 should be dismissed.

ORDER

Application RG-89943, filed with the State Engineer on October 12, 2007 and on May 5, 2008, is denied and Hearing No. 09-096 is dismissed.

Andrew B. Core
Hearing Examiner

I ACCEPT AND ADOPT THE ORDER OF THE HEARING EXAMINER, THIS 30th DAY OF March, 2012

SCOTT A. VERHINES, P.E.
NEW MEXICO STATE ENGINEER

SCOTT A. VERHINES, PE
NEW MEXICO
8706
STATE ENGINEER
REGISTERED PROFESSIONAL ENGINEER

CERTIFICATE OF SERVICE

I hereby certify that a copy of the forgoing Order was mailed to all parties of record this 30th day of March 2012. A complete copy of the service list may be obtained at the OSE website, www.ose.state.nm.us. Click on the "Help Me Find . . . ." menu, scroll down to "Hearing Information" then click on "Augustin Plains Ranch, LLC Service List - HU No. 09-096. This service list will be updated as necessary.

Reyna Aragon, Administrator
(505) 827-1428

STATE OF NEW MEXICO
COUNTY OF CATRON
SEVENTH JUDICIAL DISTRICT COURT

AUGUSTIN PLAINS RANCH, LLC

Applicant/Appellant,

v.

SCOTT A. VERHINES, P.E., No. D-728-CV-2012-00008

New Mexico State Engineer/Appellee,

and

KOKOPELLI RANCH, LLC, et al.,

Protestants/Appellees.

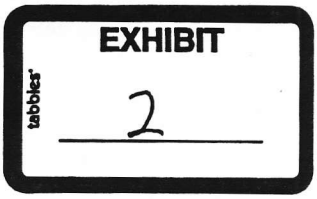
ORDER ON PROTESTANTS' MOTION FOR SUMMARY JUDGMENT

THIS MATTER came before the Court by Protestants having filed a Motion for Summary Judgment ("Motion") against Applicant Augustin Plains Ranch, LLC on July 26, 2012.

After reviewing the Motion and briefs, hearing the arguments of counsel, and being advised in the premises, the Court FINDS that:

The Court has jurisdiction over the appeal, and the Motion should be granted for the reasons set forth in the Court's Memorandum Decision on Motion for Summary Judgment filed November 14, 2012.

IT IS THEREFORE ORDERED that Protestants' Motion for Summary Judgment is granted and the State Engineer's denial of the Augustin Plains Ranch application is affirmed.



HONORABLE MATTHEW G. REYNOLDS
District Judge, 7th Judicial District Court, Division II

SUBMITTED:

Jonathan E. Sperber
Attorney for Appellee New Mexico State Engineer

APPROVED AS TO FORM:

Approved electronically December 20, 2012

/s/

John B. Draper
Jeffrey J. Wechsler
Montgomery & Andrews, P.A.
P.O. Box 2307
Santa Fe, NM 87504-2307
(505) 982-3873; (505) 982-4289 Fax
Attorneys for Applicant-Appellant

Approved electronically December 22, 2012

/s/

Peter Thomas White
Sena Plaza, Suite 50
125 East Palace Avenue
Santa Fe, NM 87504
(505) 984-2690; (505) 216-0021 Fax
Attorney for Cuchilla Valley Community Ditch Association

Approved electronically December 20, 2012

/s/

R. Bruce Frederick
Jon Block
Eric Jantz
Douglas Meiklejohn, Esq.
New Mexico Environmental Law Center
1405 Luisa Street, Ste. 5
Santa Fe, NM 87505
(505) 989-9022

Attorneys for Abbe Springs Ranches Homeowners'Ass'n; Manuel M. & Gladys E. Baca; Robert & Mona Bassett; Patti BearPaw; Liza Burroughs &Thomas Betras, Jr.; Bruton Ranch, LLC; Jack B. Bruton; Ann Boulden; Don Brooks & Joan N. Brooks; David & Terri Brown; Charles F. & Lucy G. Cloyes; Michael D. Codini Jr.; Randy Coil; James B. Coleman; Janet K. Coleman; Thomas A. Cook; Randy E. Cox; Nancy Crowley;Tom Csurilla (Elk Ridge Pass Development Company); Roger W. Daigger; Dolores Jeanne Sanchez Daigger; Michael & Ann Danielson; Bryan & Beverly Dees; John F. & Eileen K. Dodds; Louise & Leonard Donahe; Patricia Eberhardt; Roy T. Farr; Paul & Rose Geasland; Gila Conservation Coalition; Michael D. Hasson; Donald W. Hastings; Cheryl L. Hastings; Gary D. Hegg & Carol Hegg; Patricia J. Henry; Catherine Hill; Eric Hofstetter & Sandy How; Homestead Landowners Assoc., Inc.; M. Ian Jenness ;Amos Lafon; Marie Lee; Ricky & Patty Lindsey; Victoria A. Linehan; Owen Lorentzen; Michael R. Loya; Maureen M. MacArt; Sonia Macdonald; Robert & Suzan Mackenzie; Douglas Marable; Thea Marshall; Sam & Kristen McCain; Jeff McGuire; Michael Mideke; Dr. Kenneth F. Mroczek & Janice Przybyl; Peter John & Regina M. Naumnik;Robert Nelson; Dennis A. & Gertrude L. O'Toole; Walter C. & Diane D. Olmstead; Max Padget, , Karl Padget; Barney & Patricia Padgett; Wanda Parker; Ray C. & Carol W. Pittman; Patricia A. Murray Preston & John H. Preston; Daniel J. Rael; Stephanie Randolph; Mary C. Ray; Kenneth L. Rowe; Kevin & Priscilla L. Ryan; Christopher Scott Sansom; Ray and Kathy Sansom; John F. & Betty L. Schaefer; Susan Schuhardt; Bill & Anne Schwebke; Janice T. Simmons; Jim Sonnenberg; Anne Sullivan;; Margaret Thompson; Roger Thompson; Gloria Weinrich; James L. Wetzig and Wildwood Highlands Landowners' Assoc., and ; Donald & Margaret Wiltshire

STATE OF NEW MEXICO
COUNTY OF CATRON
SEVENTH JUDICIAL DISTRICT COURT

No. D-728-CV-2012-008
Judge: Reynolds

AUGUSTIN PLAINS RANCH, LLC,
Applicant/Appellant,

vs.

SCOTT A. VERHINES, P.E.,
New Mexico State Engineer/Appellee,

and

KOKOPELLI RANCH, LLC, *et al.*,
Protestants/Appellees.

MEMORANDUM DECISION ON MOTION FOR SUMMARY JUDGMENT

This matter comes before the Court on a motion for summary judgment filed by Protestants against Augustin Plains Ranch, LLC ("Applicant"). Pursuant to *Lion's Gate Water v. D'Antonio*, 2009-NMSC-57, ¶ 23, 147 N.M. 523, 226 P.3d 622, "a district court is limited to a de novo review of the issue before the State Engineer." *See* N.M. Const. art. XVI, § 5. The sole issue on appeal is whether the State Engineer was justified in denying Applicant's application for an underground water permit, without holding an evidentiary hearing.

I. STANDARD OF REVIEW

Under Rule 1-056, NMRA, "[s]ummary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. Where reasonable minds will not differ as to an issue of material fact, the court may

properly grant summary judgment. All reasonable inferences are construed in favor of the non-moving party." *Montgomery v. Lomos Altos, Inc.*, 2007-NMSC-002, ¶ 16, 141 N.M. 21, 150 P.3d 971 (citations omitted).

II. MATERIAL FACTS

The only facts under consideration in this appeal are two documents: Applicant's amended application (Exhibit "C" to Protestants' Memorandum in Support of Motion for Summary Judgment), and an e-mail modification of the amended application (Exhibit "D" to Protestants' Memorandum in Support of Motion for Summary Judgment), because Applicant argues that the amended application, as modified, supersedes the original application filed on October 12, 2007 (Exhibit "B" to Protestants' Memorandum in Support of Motion for Summary Judgment). It may reasonably be inferred that an amended application supplants an original application; therefore, the original application will not be analyzed.

If the amended application, as modified, violates New Mexico law, the motion should be granted, and the State Engineer's decision should be affirmed. Otherwise, the motion should be denied with a remand to the State Engineer to hold an evidentiary hearing on the application.

A. The Amended Application

On May 5, 2008, Applicant filed with the Office of State Engineer ("OSE") an Amended Application for Permit to Appropriate Underground Water, replacing an earlier application submitted to the OSE on October 12, 2007, collectively identified as Application RG-89943, to divert and use waters from the San Agustin Basin in Catron County, New Mexico. Paragraph 1 of the amended application, on an OSE application

form, asks for the applicant's name, contact information and address, which Applicant answered.

Paragraph 2 is entitled "Location of Wells." Applicant typed, "See Attachment A for description and location of proposed wells." Attachment A details locations of 37 proposed wells on Applicant's ranch in Catron County, New Mexico.

For Paragraph 3, "Well Information," Applicant typed, "See Attachment A," which lists the top depth of the wells (3000 feet), the casing diameter (20 inches), and the expected yield of each well (2000 gallons per minute). For the name of the well driller and driller license number, Applicant typed, "Not yet determined."

Paragraph 4 is entitled, "Quantity," for which Applicant typed "54,000" acre-feet per annum for both consumptive use and diversion amount.

Paragraph 5, "Purpose of Use," lists various purposes with blanks following each purpose: domestic, livestock, irrigation, municipal, industrial, commercial and "other (specify)." Applicant checked each blank and added other purposes of use in the line following "other": environmental, recreational, subdivision and related; replacement and augmentation. Applicant left blank Paragraph 5's last line, "Specific use: _____ _____."

On the first line below Paragraph 6's heading, "Place of Use," Applicant typed, "See Attachment B for place of use description," and left blank the spaces in the following lines:

_____acres of land described as follows:

Subdivision of Section (District or Hydrographic Survey)	Section (Map No.)	Township (Tract No.)	Range	Acres

Attachment B, "Places of Use," states that "the proposed places of use are: A. Within the exterior boundaries of Augustin Plains Ranch ("Ranch"), which is located in Catron County, New Mexico. The location of the Ranch is depicted on the attached boundary map as Exhibit 1 and further described as follows . . . ." Attachment B then provides a page and a half of legal description for the ranch. Following that legal description, Attachment B states other proposed places of use:

> B. Any areas within Catron, Sierra, Socorro, Valencia, Bernalillo, Sandoval, and Santa Fe Counties that are situated within the geographic boundaries of the Rio Grande Basin in New Mexico.

A question at the bottom of Paragraph 6 asks, "Who is the owner of the land?" Applicant answered, "Augustin Plains Ranch, LLC."

The final paragraph of the OSE form, Paragraph 7, is entitled, "Additional Statements or Explanations," with blank lines provided for an applicant to complete. Applicant wrote:

> This Amended Application is an amendment of Application No. RG-89943 filed October 12, 2007. The purpose of this Amended Application is to provide water by pipeline to supplement or offset the effects of existing uses and for new uses in the areas designated in Attachment B, in order to reduce the current stress on the water supply in the Rio Grande Basin in New Mexico. Any impairment of existing rights, in the Gila-San Francisco Basin, the Rio Grande Basin, or any other basin, that would be caused by the pumping applied for, will be offset or replaced.

The statements in the completed form were then acknowledged as being true to the best of the knowledge and belief of the signatory, a legal representative of Applicant.

B. Modification to the Amended Application

On June 26, 2008, an attorney for Applicant sent to the OSE an e-mail, with a heading of "Modified Application" and with a subject line of "Augustin Plains Ranch Application – Irrigated Acreage on the Ranch." The substance of the e-mail reads as follows:

> Please accept the following as a modification of the Augustin Plains Ranch, LLC Amended Application for Permit to Appropriate Underground Water, filed May 5, 2008. With regard to the purpose and place of use, to the extent that the applied-for water will be used for irrigation on Augustin Ranch, the irrigation will be limited to 120 acres in each of the following quarter sections: [Thereafter follows a description of 37 quarter sections] . . . .
> More specifically, to the extent that the applied-for water will be used for irrigation on Augustin Ranch, the irrigation will be limited to 120 acres within a 1,290 foot radius of each of the 37 well locations listed on Attachment A to the Amended Application. The total acreage to be irrigated on the Ranch will be 4440 acres.

Modified Application (Exhibit D to Protestants' Memorandum in Support of Motion for Summary Judgment).

III. DISCUSSION

The right to use water in New Mexico is based upon the New Mexico Constitution, which expresses the water law of prior appropriation existing at the constitution's adoption a century ago: "Although '[t]he water in the public stream belongs to the public,' Snow v. Abalos, 18 N.M. 681, 693, 140 P. 1044, 1048 (1914), unappropriated water is 'subject to appropriation for beneficial use.' N.M. Const. art. XVI, § 2. Once appropriated, '[p]riority of appropriation shall give the better right.' N.M. Const. art. XVI, § 2." *State v. City of Las Vegas,* 2004-NMSC-009, ¶ 28, 135 N.M. 375, 89 P.3d 47.

Applicant seeks to establish a water right, "a process that takes a period of time." *Hanson v. Turney*, 2004-NMCA-069, ¶ 8, 136 N.M. 1, 94 P.3d 1, citing *State ex rel. Reynolds v. Mendenhall*, 68 N.M. 467, 473, 362 P.2d 998, 1002-03 (1961) (accepting that it may require years to commence an appropriation, drill a well, install equipment, and dig ditches, all as prerequisite to applying the water to a beneficial use), and *Millheiser v. Long*, 10 N.M. 99, 106-07, 61 P. 111, 114 (1900) (noting that the building of ditches, flumes, and other works are necessary to divert water and apply it to beneficial use).

A. Statutory Procedure for Obtaining a Groundwater Permit

Under New Mexico law, there is a statutory procedure for establishing the right to use water, beginning with obtaining a water permit for surface water pursuant to Chapter 72, Article 5, NMSA 1978, and for underground water pursuant to Chapter 72, Article 12, NMSA 1978. As stated in *Hanson v. Turney,* "A water permit is an inchoate right, and 'is the necessary first step' in obtaining a water right. See Green River Dev. Co. v. FMC Corp., 660 P.2d 339, 348-51 (Wyo. 1983). It is 'the authority to pursue a water right, a conditional but unfulfilled promise on the part of the state to allow the permittee to one day apply the state's water in a particular place and to a specific beneficial use under conditions where the rights of other appropriators will not be impaired.' Id. at 348." *Hanson v. Turney,* 2004-NMCA-069, ¶ 9.

After declaring that underground waters with reasonably ascertainable boundaries belong to the public and are available for beneficial use, which is the basis, the measure and the limit of the right to use underground waters (NMSA 1978, §§ 72-12-1, 2), the Legislature prescribes the method for obtaining an underground water permit in NMSA 1978, § 72-12-3 (2001). Subsection A of Section 72-12-3 requires applicants seeking to

appropriate underground water for beneficial use to designate the following in their applications:

(1) the particular underground stream, channel, artesian basin, reservoir or lake from which water will be appropriated;

(2) the beneficial use to which the water will be applied;

(3) the location of the proposed well;

(4) the name of the owner of the land on which the well will be located;

(5) the amount of water applied for;

(6) the place of the use for which the water is desired; and

(7) if the use is for irrigation, the description of the land to be irrigated and the name of the owner of the land.

NMSA 1978, § 72-12-3(A) (2001).

No application can be accepted by the State Engineer unless all of the information required by Subsection A accompanies the application. Section 72-12-3(C). Upon the filing of an application, the State Engineer causes notice of the application to be published for three consecutive weeks in newspapers in the county where the well will be located and in each county where the water will be placed to beneficial use. Section 72-12-3(D). Objections may be filed within ten days of the last notice. *Id.* Subsection D then limits the persons who may object to the application:

> Any person, firm or corporation or other entity objecting that the granting of the application will impair the objector's water right shall have standing to file objections or protests. Any person, firm or corporation or other entity objecting that the granting of the application will be contrary to the conservation of water within the state or detrimental to the public welfare of the state and showing that the objector will be substantially and specifically affected by the granting of the application shall have standing to file objections or protests; provided, however, that the state of New Mexico or any of its branches, agencies, departments,

> boards, instrumentalities or institutions, and all political subdivisions of the state and their agencies, instrumentalities and institutions shall have standing to file objections or protests.

NMSA 1978, § 72-12-3(D) (2001).

If no objections or protests are filed, the State Engineer is required "to grant the application and issue a permit to the applicant to appropriate all or a part of the waters applied for, subject to the rights of all prior appropriators from the source," if he finds that there are unappropriated waters or if the proposed appropriation would not impair existing water rights from the source, is not contrary to conservation of water within the state and is not detrimental to the public welfare of the state. Section 72-12-3(E).

The State Engineer has two options for applications that are opposed or if he is of the opinion that the permit should not be issued. "He may deny the application without a hearing or, before he acts on the application, may order that a hearing be held." Section 72-12-3(F).

If the State Engineer decides to grant an application, then the water user has "a reasonable time after an initial appropriation to put water to beneficial use, known as the doctrine of relation. State ex rel. Reynolds v. Mendenhall, 68 N.M. 467, 470-71, 362 P.2d 998, 1001 (1961); Hagerman Irrigation Co., 16 N.M. at 180, 113 P. at 824-25. 'If the application to beneficial use is made in proper time, it relates back and completes the appropriation as of the time when it was initiated.' Hagerman Irrigation Co., 16 N.M. at 180, 113 P. at 825." *State v. City of Las Vegas,* 2004-NMSC-009, ¶ 35, 135 N.M. 375, 89 P.3d 47. Thus, if the application in this case had been approved by the State Engineer, upon the actual appropriation of water to beneficial use, Applicant's priority date would have been the date of his original application.

B. State Engineer's Decision

After accepting Applicant's original and amended application, as modified, the State Engineer published notices in a number of counties. Over 900 protests were filed. An OSE hearing examiner considered motions to dismiss and held a hearing on those motions. *See* Scheduling Order (Exhibit "E" to Protestants' Memorandum in Support of Motion for Summary Judgment). He then entered an "Order Denying Application," approved by the State Engineer on March 20, 2012 (Exhibit "A" to Protestants' Memorandum in Support of Motion for Summary Judgment).

The hearing examiner's findings and recommendations comprise 26 paragraphs. The first four deal with the State Engineer's jurisdiction, the relief sought and the lack of a need for separate hearings on the various motions to dismiss. Paragraph 5 points to several of the requirements in Section 72-12-3(A) relevant to the hearing officer's decision: "In the application, the applicant **shall** designate: . . (2) the beneficial use to which the water will be applied; and . . . (6) the place of use for which the water is desired; and . . . (7) if the use is for irrigation, the description of the land to be irrigated and the name of the owner of the land." (emphasis added by the hearing examiner)

After citing the State Engineer's statutory authority to deny a permit without a hearing (Paragraphs 6-7), in Paragraph 8 the hearing examiner finds the amended application to be facially invalid vis-à-vis the place of use and the beneficial use to which the water will be applied:

> The face of the subject amended Application requests almost all possible uses of water, both at the Ranch location and at various unnamed locations within "Any areas within Catron, Sierra, Socorro, Valencia, Bernalillo, Sandoval and Santa Fe Counties that are situated within the geographic boundaries of the Rio Grande Basin. . . ," but does not identify a purpose of use at any one location with sufficient specificity to allow for reasonable evaluation of whether the proposed

> appropriation would impair existing rights or would not be contrary to the conservation of water in the state or would not be detrimental to the public welfare of the state.

Order Denying Application, ¶ 8.

While finding later in his decision that it is unclear whether irrigation is contemplated only on the Ranch (Paragraph 20), in Paragraphs 9-10, the hearing examiner discusses the amount of water proposed to be used for irrigation, assuming it is all to be used on the Ranch. By dividing the 54,000 acre-feet of water per acre per year (afy) requested by Applicant by the number of acres to be irrigated on the Ranch (4,440), the hearing officer finds that the application calls for a crop irrigation requirement (CIR) of 12.16 afy, much more than the three afy usually recognized by the State Engineer in his administrative practice. Therefore, applying 12.16 afy "to any land within the Rio Grande Underground Water Basin would be contrary to sound public policy." Order Denying Application, ¶ 11.

Paragraphs 12 and 13 quote statements in the original application regarding potential uses for compact deliveries and for supporting municipalities. The hearing examiner notes that neither the Interstate Stream Commission, the only entity authorized to administer compact deliveries to the State of Texas, nor any municipality is a co-applicant. Order Denying Application, ¶¶ 13-16.

Stating that "an application is, by its nature, a request for final action," and that "[i]t is reasonable to expect that, upon filing an application, the Applicant is ready, willing and able to proceed to put water to beneficial use," the hearing examiner finds that "[t]he statements on the face of the subject Application make it reasonably doubtful that the Applicant is ready, willing and able to proceed to put water to beneficial use."

Order Denying Application, ¶¶ 17-19. The hearing examiner concludes it would be against sound public policy to consider an application that lacks specificity of purpose of the use of water, the actual end-user, specific identification of delivery points or methods of delivery. Order Denying Application, ¶¶ 21-22.

In its closing paragraphs, the Order Denying Application determines that the application is so vague and overbroad that it cannot be reasonably evaluated, contrary to public policy, that the application should not be considered, pursuant to NMSA 1978, § 72-5-7 (1985), that the application should be dismissed without prejudice to filing of subsequent applications, and that the hearing should be dismissed. Order Denying Application, ¶¶ 22-26.

IV. ANALYSIS

A. The State Engineer was required to deny the application if it violated New Mexico law.

The State Engineer has the authority to deny underground water permits without a hearing, NMSA 1978, § 72-12-3(F) (2001), a section in the groundwater permitting statutes which the State Engineer cites, albeit incorrectly, in his Order Denying Application, ¶ 6. Applicant argues that once the OSE accepted the application and published notice, the State Engineer could not reject the application without a hearing. Applicant's Response in Opposition to Motion for Summary Judgment, at 14-15. Section 72-12-3(C) provides that no application can be accepted by the State Engineer unless all of the information required by Subsection A accompanies the application. The OSE staff did determine that the form had been completed with all the information required, but it was within the State Engineer's authority, pursuant to Section 72-12-3(F), to deny the application without a hearing. The duties from the two subsections differ. The first

under Subsection C is an administrative task by OSE staffers to make sure an application is complete before proceeding to publication and submission to a hearing examiner for review. The hearing examiner then analyzes the substance of an application in light of New Mexico water law and the issues raised by protestants, if any.

If the acceptance by the OSE under Subsection C requires the hearing examiner under Subsection F to hold an evidentiary hearing, the statutory language in Subsection F allowing him to deny an application without a hearing would be negated. "[W]e must interpret the statute according to common sense and reason, Sandoval v. Rodriguez, 77 N.M. 160, 420 P.2d 308 (1966); give its words their usual and ordinary meaning unless a contrary intent is clearly indicated, State ex rel. Duran v. Anaya, 102 N.M. 609, 698 P.2d 882 (1985); give effect to every part of the statute, Weiland v. Vigil, 90 N.M. 148, 560 P.2d 939 (Ct. App.), cert. denied, 90 N.M. 255, 561 P.2d 1348 (1977); and construe it as a harmonious whole. General Motors Acceptance Corp. v. Anaya, 103 N.M. 72, 703 P.2d 169 (1985)." *Varoz v. New Mexico Bd. of Podiatry,* 104 N.M. 454, 456, 722 P.2d 1176 (S. Ct. 1986).

Section 72-12-3(F) provides the statutory authority for the State Engineer to deny an application without a hearing, but the State Engineer also cites a surface water statute as his authority to deny an underground water application, NMSA 1978, § 72-5-7 (1985), which provides in pertinent part that the State Engineer "may also refuse to consider or approve any application or notice of intention to make application . . . if, in his opinion, approval would be contrary to the conservation of water within the state or detrimental to the public welfare of the state." Order Denying Application, ¶ 7; *see also* Order Denying Application, ¶ 24.

At oral argument on appeal, counsel for the State Engineer referred to *City of Albuquerque v. Reynolds,* 71 N.M. 428, 437, 379 P.2d 73, 79 (1962) as support for the State Engineer's policy of applying a statute found only in one part of the water code to both surface and groundwater issues. *City of Albuquerque v. Reynolds* does provide support for this policy for substantive issues once a water right is secured, but it does not provide support for confusing the procedural processes to obtain surface and groundwater permits. As quoted in *Hydro Resources Corp. v. Gray*, 2007-NMSC-061, ¶ 21, 143 N.M. 142, 173 P.3d 749, "There does not exist one body of substantive law relating to appropriation of stream water and another body of law relating to appropriation of underground water. The legislature has provided somewhat different administrative procedure [sic] whereby appropriators' rights may be secured from the two sources but the substantive rights, when obtained, are identical." City of Albuquerque v. Reynolds, 71 N.M. 428, 437, 379 P.2d 73, 79 (1962)." Accordingly, the surface water statute governing administrative procedures has no bearing on the State Engineer's decision to deny the underground water application in this case.

Section 72-12-3(F) does not explain under what circumstances the State Engineer may deny an application. The State Engineer is an administrative officer whose office is created by statute, NMSA 1978, § 72-2-1 (1982), and whose authority is thereby "limited to the power and authority that is expressly granted and necessarily implied by statute." *In re Application of PNM Elec. Servs.,* 1998-NMSC-017, ¶ 10, 125 N.M. 302, 961 P.2d 147. If the application is facially invalid, that is, that on its face the application violates New Mexico law, the State Engineer had no authority to act other than to reject the application.

B. *The application violates the underground water permitting statute and contradicts beneficial use as the basis of a water right and the public ownership of water, as declared in the New Mexico Constitution.*

In reviewing the State Engineer's decision de novo, this Court has determined that the application had to be denied by the State Engineer for the following reasons: (1) the application fails to specify the beneficial purpose and the place of use of water, contrary to NMSA 1978, § 72-12-3(A)(2),(6) (2001); and (2) the application contradicts beneficial use as the basis of a water right and the public ownership of water, as declared in the New Mexico Constitution.

In this de novo review, this Court will not examine the argument of Protestants (Memorandum in Support of Protestants' Motion for Summary Judgment, at 12-13) that the application violated statutory notice provisions, because that is a secondary issue that would only be addressed if the application passed the threshold issue of facial validity. See *Lion's Gate Water v. D'Antonio,* 2009-NMSC-057, 147 N.M. 523, 229 P.3d. 622.

In *Lion's Gate,* the Supreme Court held that the State Engineer was barred from considering secondary issues such as impairment and conservation of water if as a threshold issue he determined that there was no water available to appropriate. *Id.*, 2009-NMSC-057, ¶ 27 ("If the State Engineer makes a pre-hearing determination that water is unavailable for appropriation, secondary issues that must otherwise be considered before a permit to appropriate water can be granted become irrelevant, because the State Engineer is required to reject the application without reaching those issues.")

Likewise in this de novo appeal, the State Engineer's decision was based on the application itself rather than the secondary issue of potential protestants' rights to notice. Under Section 72-12-3(F), the State Engineer can deny an application regardless

of protests if he determines, as he did here, that the threshold issue of validity vis-à-vis New Mexico water law requires him to reject an application on its face.

1. The application fails to specify the beneficial purpose and the place of use of water, contrary to NMSA 1978, § 72-12-3(A)(2),(6) (2001).

The statutory provision outlining the requirements for an underground water permit application is NMSA 1978, § 72-12-3 (2001). Subsection (A)(2) requires an applicant to designate "the beneficial use to which the water will be applied." Applicant listed eleven uses in its amended application. Subsection (A)(6) requires an applicant to designate "the place of the use for which the water is desired." For its proposed places of use Applicant identified 37 quarter sections on its ranch and "[a]ny areas within Catron, Sierra, Socorro, Valencia, Bernalillo, Sandoval, and Santa Fe Counties that are situated within the geographic boundaries of the Rio Grande Basin in New Mexico." Amended Application, Attachment B.

The State Engineer determined that the eleven proposed uses, in conjunction with the broad descriptions for place of use, were not sufficiently specific to allow the State Engineer to determine whether the application should be granted, because it was unclear where the water would be used and for what purpose. The State Engineer could not fulfill his statutory duty to evaluate "whether the proposed appropriation would impair existing rights or would not be contrary to the conservation of water in the state or would not be detrimental to the public welfare of the state." Order Denying Application, ¶ 8.

On appeal, Applicant argues that nothing in the regulations or statutes prohibits an applicant from identifying multiple beneficial uses. Applicant's Response in Opposition to Protestants' Motion for Summary Judgment, at 10-11. Applicant also argues that the seven counties and the watershed boundaries of the Rio Grande are definite enough to

provide "sufficient information to allow interested parties to identify the legal subdivision where the water will be put to use." Applicant's Response in Opposition to Protestants' Motion for Summary Judgment, at 12-13. Throughout its Response to Protestants' Motion for Summary Judgment, Applicant argues that the application should be treated as a court complaint and be given the benefit of the doubt as to specificity until the case is heard on its evidentiary merits.

Unlike civil complaints brought under the original jurisdiction of a district court, this matter arises from a statutory permitting procedure before the State Engineer, requiring analysis of the statute governing the granting of an underground water permit. There is a dispute as to whether the statute requires specificity, and if so, whether the amended application meets the statutory specificity requirement. It is not clear, however, from a plain reading of Sections 72-12-3(A)(2) and (6) what the Legislature intended in regard to the level of specificity mandated. Therefore, the Court "must resort to construction and interpretation to ascertain legislative intent." *Vaughn v. United Nuclear Corp.*, 98 N.M. 481, 485, 650 P.2d 3 (Ct. App. 1982).

As stated in *State v. Nick R.*, 2009-NMSC-050, ¶ 16, 147 N.M. 182, 218 P.3d 868, "The first step in any statutory construction is to try 'to determine and give effect to the Legislature's intent' by analyzing the language of the statute," quoting *Marbob Energy Corp. v. N.M. Oil Conservation Comm'n,* 2009-NMSC-013, ¶ 9, 146 N.M. 24, 206 P.2d 3.

The language of Sections 72-12-3(A)(2) and (6) employ a singular noun for an application's required beneficial "use" and "place" of use. The singular does not mean, however, that the statute requires an applicant to seek only one use in only one place per

application. There is a rule of statutory construction that states, "Use of the singular number includes the plural, and use of the plural number includes the singular." NMSA 1978, § 12-2A-5(A) (1997), cited by *State v. McClendon,* 2001-NMSC-023, ¶ 16, 130 N.M. 551, 28 P.3d 1092.

Just because the underground water permitting statute may allow for designation of multiple uses and places of use does not mean that all or nearly all possible uses and huge areas of land for places of use can be stated in an application without being rejected for vagueness. There is no question that if no beneficial use or place of use was selected, then the application would have to be denied. In fact, it would have been rejected earlier by OSE staff pursuant to Section 72-12-3(C) as being incomplete. On the other end of the spectrum is when all of the choices for place of use are checked off and even more are added. By choosing all of the named options and including several more, there was no narrowing down or selection of use in the application itself, there was just an "all of the above" approach. As for place of use, designating "any" area within the seven-county Middle Rio Grande watershed opened up great uncertainty as to where Applicant's pipeline would go and where it would be actually used, because the word "any" is a general term rather than specific.

Under Applicant's view of the permit process, identifying the actual, specific use and actual, definite place of use would not be required until later in the process, which Applicant intimates would be developed through an evidentiary hearing, a hearing the State Engineer denied. If, however, an underground water permit application requires specificity, then the amended application failed to specify, that is, that it failed to particularize, Applicant's plans for actual beneficial use of water and the actual place of

use for the water, thereby making it impossible for the State Engineer to perform his statutory duty of determining whether to grant the application and issue a permit. *See Tri-State Generation & Transmission Ass'n v. D'Antonio,* 2011-NMCA-015, ¶¶ 12-13, 149 N.M. 394, 249 P.3d 932, *reversed on other grounds, Tri-State Generation & Transmission Ass'n v. D'Antonio,* No. 32,704, slip op. (N.M. S. Ct. Nov. 1, 2012) ("The . . . permitting . . . statutes . . . require the State Engineer to evaluate factors such as beneficial use, availability of unappropriated water, and impairment of existing rights. In order to evaluate beneficial use, the State Engineer must assess the quantity, place of use, and purpose to which water has actually been applied. See State ex rel. Martinez v. McDermett, 120 N.M. 327, 330, 901 P.2d 745, 748 (Ct. App. 1995).")

Other subsections of the statute can be read *in pari materia* with Subsection (A)(2) to determine whether "beneficial use" and "place of use" must be stated with specificity. *See State v. Gurule,* 2011-NMCA-042, ¶ 12, 149 N.M. 599, 252 P.3d 823 ("[A]s a rule of statutory construction, we read all provisions of a statute and all statutes in pari materia together in order to ascertain the legislative intent. Roth v. Thompson, 113 N.M. 331, 334, 825 P.2d 1241, 1244 (1992).")

That the underground water permitting statute calls for specificity of beneficial use and place of use is supported by Subsection (A)(1), which requires applicants to designate "the **particular** underground stream, channel, artesian basin, reservoir or lake from which water will be appropriated." NMSA 1978, § 72-12-3(A)(1) (2001) (emphasis added). Further, in Subsection D, in order to have standing, objectors to an application must prove that they "**will be** substantially and **specifically** affected by the granting of the application." NMSA 1978, § 72-12-3(D) (2001) (emphasis added). It would be

anomalous for an applicant to be allowed to give general statements of intent to appropriate water for beneficial use yet require specificity for objectors. That over 900 protests were filed in this case demonstrates the absurdity of this result, if Applicant's interpretation of the statute were allowed to stand. "We do not construe a statute in a manner that is contrary to the intent of the legislature or in a manner that would lead to absurd or unreasonable results. State v. Padilla, 1997-NMSC-22, P6, 123 N.M. 216, 937 P.2d 492; State v. Shafer, 102 N.M. 629, 637, 698 P.2d 902, 910 (stating that statutes must be construed according to the purpose for which they were enacted and not in a manner which leads to absurd or unreasonable results)." *State v. Romero*, 2002-NMCA-106, ¶ 8, 132 N.M. 745, 55 P.3d 441.

New Mexico courts have long considered specificity to be a statutory requirement for an underground water permit. *Hanson v. Turney, supra* ("A water permit is . . . 'the necessary first step' in obtaining a water right. . . to one day apply the state's water in a **particular place** and to a **specific beneficial use**.") (citations omitted); *Mathers v. Texaco, Inc.*, 77 N.M. 239, 248, 421 P.2d 771 (S. Ct. 1977) ("Here the applicant, Texaco, has **expressly specified the particular use** for which the water **is** to be appropriated and the **precise lands** to which the same **is** to be applied to accomplish the purpose of such use.") (emphasis added); *Cartwright v. Public Serv. Co.*, 66 N.M. 64, 110, 343 P.2d 654 (1959) (Federici, D.J., dissenting) ("The appropriator acquires only the right to take from the stream a given quantity of water for a **specified purpose**, Snow v. Abalos, 18 N.M. 681, 140 P. 1044, supra. Many times this Court has held that the priority of right is based upon the intent to take a **specified amount** of water for a **specified purpose** and he can

only acquire a perfected right to so much water as he applied to beneficial use.") (emphasis added)

Because Applicant failed to specify beneficial uses and places of use in its application and chose to make general statements covering nearly all possible beneficial uses and large swaths of New Mexico for its possible places of use, the State Engineer had no choice but to reject the application. The application does not reveal a present intent to appropriate water, but merely to divert it and explore specific appropriations later. See *State ex rel. Reynolds v. Miranda,* 83 N.M. 443, 493 P.2d 409 (S. Ct. 1972), citing *Harkey v. Smith*, 31 N.M. 521, 247 P. 550 (1926), for the proposition that the intent, diversion and use of water must coincide for an effective appropriation.

The lack of specificity for beneficial use and place of use is also demonstrated by analysis of another portion of the application and the State Engineer's denial. The State Engineer denied the application based in part on his determination that applying 12.16 afy "to any land within the Rio Grande Underground Water Basin would be contrary to sound public policy." Order Denying Application, ¶ 11. Although the State Engineer stated that the usual CIR approved by the OSE is 3 afy, he did not state that no other applications that exceed that amount had been approved by the OSE. There is not enough information in the Order Denying Application for this Court to state with certainty that the amount applied to irrigation by Applicant would actually be 12.16 afy and that that amount would be, as a matter of law, excessive.

The State Engineer's difficulty in analyzing the application stems from the application's inherent ambiguity. The application is uncertain as to what amounts, if any, would be used for irrigation on Applicant's ranch because the application states its

purpose is to provide a pipeline for new and existing uses on the Rio Grande. That statement in Paragraph 7 of the application about a pipeline contradicts the modification to the amended application, which suggests that the 37 wells might provide irrigation to their respective 37 quarter sections, to the extent there would be any irrigation on the ranch resulting from the grant of a water permit. Because of the confusion between the application's stated pipeline purpose and the uncertain amounts to be used for irrigation on the ranch, the current application is invalid for lack of clarity.

The dismissal without prejudice allows Applicant to submit an application that meets the statutory requirement of specificity for beneficial use and place of use. But the application under review just outlines general potential uses and places of use; it does not describe what actually *is* to be the purpose and place of use. Rather than being the "first step" in obtaining a water right, the application demonstrates that Applicant is merely contemplating possible steps, like a player holding onto a chess piece before committing to a particular move. Under Applicant's theory, the statutory permit process is "inherently flexible," allowing a water user to make broad statements of use and place of use and lay claim to whatever amount of water a basin can bear, and then during the permit process that broad claim can be narrowed down by the State Engineer through evidentiary hearings. *See* Applicant's Response in Opposition to Motion for Summary Judgment, at 28.

Contrary to Applicant's theory, the history and purpose of the underground water permitting statute, NMSA 1978, § 72-12-3 (2001), underscore the requirement of an actual, specific plan to be outlined in an application. When interpreting statutes, "we seek to give effect to the Legislature's intent, and in determining intent we look to the

language used and consider the statute's history and background." *Lion's Gate Water v. D'Antonio,* 2009-NMSC-057, ¶ 23, 147 N.M. 523, 229 P.3d. 622 (citations omitted).

In *State ex rel. Reynolds v. Mendenhall,* 68 N.M. 467, 362 P.2d 988 (1961), the Supreme Court, faced with the question of the priority date of a well, explored the history of groundwater statutes in light of the doctrine of relation. "Long in his Treatise on the Law of Irrigation (2d Ed.) 126, describes the doctrine in these words: 'The rights of an appropriator of water do not become absolute until the appropriation is completed by the actual application of the water to the use designed; but where he had pursued the work of appropriation with due diligence, and brought it to completion within a reasonable time, as against other appropriators, his rights will relate back to the time of the commencement of the work . . . ." *State ex rel. Reynolds v. Mendenhall,* 68 N.M. at 470.

Mendenhall traces New Mexico's application of the doctrine of relation for surface water from the territorial cases of *Keeney v. Carillo,* 2 N.M. 480 (1883) (doctrine applied to waters of a spring, stream or cienega) and *Millheiser v. Long*, 10 N.M. 99, 61 P. 111 (1900) (applying the doctrine in "holding that a valid appropriation was accomplished when, after an intention had been formed, notice of such intent given, and the works constructed, water was diverted and put to beneficial use within a reasonable time"). *State ex rel. Reynolds v. Mendenhall,* 68 N.M. at 471.

Among other precedents, *Mendenhall* cites *Farmers' Dev. Co. v. Rayado Land & Irrigation Co.,* 28 N.M. 357, 213 P. 202 (1923), a case examining the common law of appropriation, the first territorial permitting statutes of 1905 that permissively replaced procedures for obtaining a water right under the common law of appropriation, and the

1907 territorial water code that mandated that permits replace the former common law rules of appropriation in securing a water right.

Mendenhall cites all these cases because the Supreme Court faced a problem as to how to determine the priority date for underground waters without clear statutory authority. The underground water statutes enacted first in 1927 and again in 1931 did not explicitly mention the doctrine of relation, whereas the 1907 water code covering surface waters did. After declaring that all surface waters belong to the public and are subject to appropriation for beneficial use, NMSA 1978, § 72-1-1 (1907), the Legislature explicitly declared that the doctrine of relation applied to appropriated surface waters: "All claims to the use of water initiated thereafter [after March 19, 1907] shall relate back to the date of the receipt of an application therefor in the office of the territorial or state engineer, subject to compliance with the provisions of this article, and the rules and regulations established thereunder." NMSA 1978, § 72-1-2 (1907).

The Supreme Court in *Mendenhall* held that the doctrine of relation was implicitly the law for underground waters because the general law of appropriation applies equally to surface and ground water. *State ex rel. Reynolds v. Mendenhall,* 68 N.M. at 472, citing *Yeo v. Tweedy,* 34 N.M. 611, 286 P. 970 (1929) and *Pecos Valley Artesian Conservancy Dist. v. Peters,* 52 N.M. 148, 193 P.2d 418 (1948).

With a statutory permit, an appropriator, whether for surface or underground waters, has a clearly defined priority date, which is the date the application was received by the State Engineer, a great innovation in western water law in the late 19th and early 20th centuries. Samuel C. Wiel, in his landmark work, **Water Rights in the Western States**, described how permitting statutes grew out of the pre-existing laws and were

generally declaratory thereof, but the statutes provided an advantage over the older law by providing certainty as to which person had the priority of time and therefore priority of right. *See* N.M. Const. art. XVI, § 2, "Priority of appropriation shall give the better right."

A permitting statute would "fix the procedure whereby a certain definite time might be established as the date at which title should accrue by relation." Wiel, **Water Rights in the Western States**, §§ 368-69, pp. 398-99 (3d. ed. 1911). As Wiel noted in Section 368, both the old law and the new permitting statutes did not countenance anyone acting "the dog in the manger," a reference to Aesop's fable of a dog that blocks cattle from feeding, even though the dog itself has no appetite for hay. Wiel wrote, "Many attempted to secure monopoly of waters by merely posting notices or making a pretense at building canals, ditches, etc., and tried by this means to hold a right to the water against later comers who *bona fide* sought to construct the necessary works for its use." *Id.*, § 368. See also *Cartwright v. Public Serv. Co.*, 66 N.M. at 110 (Federici, D. J., dissenting), referencing state policy prohibiting "the dog in the manger" tactics, quoting with approval *Harkey v. Smith,* 31 N.M. 521, 531, 247 P. 550 (1926) ("[N]o dog in the manger' policy can be allowed in this state. [U]nless these waters can be and are beneficially used by plaintiffs, the defendants or others may use the same.")

If its application had been approved, Applicant would have had a priority date of October 12, 2007, the date of the original application's receipt by the OSE, after Applicant had applied the waters to beneficial use. In the meantime, however, while Applicant was deciding exactly how and where to apply the waters approved, Applicant would have had tentative priority over anyone else who after October 12, 2007 wanted to

use the same waters or waters hydrologically related thereto. For many years, Applicant would have been the dog in a very big manger, an entire underground water basin.

To place the size of Applicant's claim in perspective, this Court takes judicial notice of a New Mexico appellate decision describing the Pecos River settlement agreement among the Carlsbad Irrigation District, the State of New Mexico, the United States and other entities. This major settlement agreement, described in *State ex rel. Office of State Engineer v. Lewis,* 2007-NMCA-008, ¶¶ 44-45, 141 N.M. 1, 150 P.3d 375, "judicially establishes the maximum allowable annual diversion and storage rights of the United States and the CID, and the CID's right to deliver water for the members of the CID," in the amount of 50,000 afy. Applicant's claim over water, in the amount of 54,000 afy, is larger than the maximum water supply available for the Carlsbad Irrigation District's many users. This illustration from one watershed demonstrates the enormous potential available for Applicant to monopolize the waters that would have otherwise been available to other users wishing to apply the underground waters of the San Agustin Basin to beneficial use.

In reviewing the application in light of the permitting statute's language, context, history and purpose, there is no genuine issue of material fact as to the application's invalidity regarding purpose and place of use. As admitted by Applicant, "[h]ow and whether Augustin will be able to put water to beneficial use is an issue that cannot be determined from the Application alone." Applicant's Response in Opposition to Motion for Summary Judgment, at 25. With no details for all of the required elements of a water permit, the State Engineer could not perform his statutory duties under NMSA 1978, § 72-12-3(E) (2001) of determining whether the proposed appropriation would impair

existing rights, be contrary to the conservation of water, or be detrimental to the public welfare. As a matter of law, the State Engineer could not allow an applicant to hold up other uses of water under the doctrine of relation, when the applicant broadly claims a huge amount of water for any use and generalizes as its place of use "any area" in seven counties in the Middle Rio Grande Basin, covering many thousands of square miles.

2. The application contradicts beneficial use as the basis of a water right and the public ownership of water, as declared in the New Mexico Constitution.

The State Engineer relied in part on "sound public policy" as grounds for summarily denying Applicant's permit application. Order Denying Application, ¶¶ 21-23. Applicant argues that "the State Engineer lacks authority to deny an application that otherwise meets the statutory requirements on the basis of public policy." Applicant's Response in Opposition to Motion for Summary Judgment, at 17-18. A sound public policy at the heart of this case is the prior appropriation doctrine. *See Hydro Resources Corp. v. Gray*, 2007-NMSC-061, ¶ 17 ("New Mexico follows the doctrine of prior appropriation.") *See also, Walker v. United States*, 2007-NMSC-038, 142 N.M. 45, 162 P.3d 882 (discussing distinctions between the prior appropriation doctrine of the arid West and the riparian rights doctrine found primarily in the wetter East).

At the founding of this state, the people of New Mexico elevated the prior appropriation doctrine to constitutional status. N.M. Const. art. XVI, §§ 2, 3. Two fundamental elements of the prior appropriation doctrine are that the waters in the State of New Mexico belong to the public and that beneficial use is the basis, the measure and the limit of the right to the use of water. *Id.* Both of these elements of the prior appropriation doctrine are undermined if Applicant's theory of securing water rights is allowed to stand.

Beneficial use is the basis, the foundation, for the establishment of rights to the use of water in New Mexico, "a fundamental principle in prior appropriation." *State ex rel. Martinez v. City of Las Vegas,* 2004-NMSC-009, ¶ 33, 135 N.M. 375, 89 P.3d 47. In reaffirming the principle of beneficial use that had been undercut by the expansion of the pueblo rights doctrine in *Cartwright v. Public Serv. Co.*, 66 N.M. 64, 343 P.2d 654 (1959), the Supreme Court in 2004 reiterated that "[t]he principle of beneficial use is based on 'imperative necessity,' Hagerman Irrigation Co. v. McMurry, 16 N.M. 172, 181, 113 P. 823, 825 (1911), and '**aims fundamentally at definiteness and certainty**.' Crider, 78 N.M. at 315, 431 P.2d at 48 (quotation marks and quoted authority omitted)." (emphasis added) Thus, not only does the underground water permitting statute require specificity, the constitutional mandate of beneficial use as the basis of a water right requires specificity of the actual place and use of water, along with all the other definite elements required to create a water right.

Applicant's plan for the use of 54,000 afy reveals no definiteness or certainty other than the purpose of the application being the creation of a pipeline served by 37 wells, with the actual uses to be figured out later. Under this plan, diversion would supplant beneficial use as the fundamental principle of water use in New Mexico. One would only have to apply for a permit to divert a given quantity of water, no matter how large, and that person would then have a prior claim to the water over anyone else who actually had a specific plan for the water's beneficial use.

Over a century ago, that plan was attempted when some irrigators diverted the entire flow of the Hondo River but failed to apply it to beneficial use before other irrigators had beneficially used the waters in the stream. The Territorial Supreme Court

in *Millheiser v. Long*, 10 N.M. 99, 104, 61 P. 111, 114 (1900) reversed a district court's determination of the parties' rights "according to priority of diversion, rather than priority of appropriation to a beneficial use." "Diversion," the Supreme Court noted, "is still but an element of that appropriation, and not equivalent to it." *Id.* From that day to the present, it has been the law in New Mexico that diversion alone is not beneficial use. See *State of New Mexico ex rel. Turney v. United States of America et al. and Baca* (Subfile Defendant), No. 30,824, slip. op. at 15-16 (N.M. Ct. App. October 24, 2012), citing *State ex rel. Martinez v. McDermett*, 120 N.M. 327, 331, 901 P.2d 745, 749 (Ct. App. 1995) for the proposition that "diversion alone is not beneficial use."

Applicant seeks to become the purveyor of water via pipeline to users along the Rio Grande. Admittedly, there is stress on the existing uses of water in New Mexico, and if diversion alone were the requirement for establishing priority of the use of water, Applicant's plan as stated in his amended application might suffice: "The purpose of this Amended Application is to provide water by pipeline to supplement or offset the effects of existing uses and for new uses in the areas designated in Attachment B, in order to reduce the current stress on the water supply in the Rio Grande Basin in New Mexico." Beneficial use, however, is still the basis for a water right, not diversion. Therefore, the application is invalid as a matter of law.

Even if there was such a radical shift from beneficial use to diversion as the basis for a water right, a proposition, like the pueblo rights doctrine, "as antithetical to the doctrine of prior appropriation as day is to night," *Cartwright*, 66 N.M. at 110, 343 P.2d at 686 (Federici, D.J., dissenting), quoted in *State v. City of Las Vegas,* 2004-NMSC-009, ¶ 38, a major pipeline project such as envisioned by Applicant to "reduce the current

stress on the water supply in the Rio Grande Basin" would effectively transfer the ownership of much of the waters in the San Agustin Basin to a private entity. Via its pipeline, Applicant would be the middleman conveying a large amount of the state's waters to beneficial users, and perhaps to the state itself for Rio Grande compact deliveries, if those uses were first approved by Applicant and then ratified by the OSE.

But the public, not private entrepreneurs, own the water of this state. There is ample appellate authority emphasizing the public's ownership of New Mexico's waters. As quoted in the *Cartwright* dissent, "This Court said as late as 1947, in the case of State ex rel. State Game Commission v. Red River Valley Company, 51 N.M. 207, 224, 182 P.2d 421, 432: '. . . It is all yet public water until it is beneficially applied to the purposes for which its presence affords a potential use.'" *Cartwright*, 66 N.M. at 110. *See also The Albuquerque Land and Irrigation Co. v. Gutierrez,* 10 N.M. 177, 61 P. 357 (1900) (rejecting the riparian doctrine and holding that there is no private ownership of public streams in New Mexico); *Tri-State Generation & Transmission Ass'n v. D'Antonio,* No. 32,704, slip op. at 12 (N.M. S. Ct. Nov. 1, 2012) ("[W]ater belongs to the state which authorizes its use. The use may be acquired but there is no ownership in the corpus of the water. . . . **The state as owner of water has the right to prescribe how it may be used** . . . . The public waters of this state are owned by the state as trustee for the people.") (citations omitted) (emphasis added)

Under its diversion plan for the 37 wells on its ranch, Applicant, rather than the state initially, would have the right to prescribe which entities and projects would be allocated a share in the 54,000 afy that could be pumped from the underground basin, with the final approval, of course, by the State Engineer, over the years as those projects

were conceived and given detail. The plan, if the application had been approved, would have removed the unappropriated waters in the San Agustin Basin from their character as public water, as described in *Red River Valley, supra,* prior to its being "beneficially applied;" the underground waters' potential use would be enough to create Applicant's claim of prior rights by a proposal for diversion alone, leaving the details of actual use for the future and under the direction of Applicant, who would thereby be a co-approver with the State Engineer for determining the beneficial uses for the underground waters.

This plan is reminiscent of that of Nathan Boyd at the turn of the last century for a dam and diversion of practically all of the waters in the Rio Grande flowing through the Mesilla and El Paso Valleys to be then sold to the local irrigators, a plan that was ultimately frustrated on technical grounds by the New Mexico territorial courts and the U.S. Supreme Court. *See United States v. Rio Grande Dam & Irrigation Co.,* 13 N.M. 386, 85 P.393 (1906), *affirmed by Rio Grande Dam & Irrigation Co. v. United States,* 215 U.S. 266, 54 L. Ed. 190, 30 S. Ct. 97 (1909); *see generally,* Phillips, Hall & Black, **Reining in the Rio Grande**, pp. 88-92 (2011).

In its Sur-Reply, Applicant likens its application to that of the Interstate Stream Commission (ISC) for a change of use/place of use for the waters of the Ute Reservoir, also known as Ute Lake, which application is attached as Exhibit A to Applicant's Sur-Reply. Both applications seek to transport a large quantity of water through pipelines and both claim all possible uses of water for their ultimate users, but that is where the comparison ends.

The ISC, a state entity created by statute in 1935, is governed by Chapter 72, Article 14 of the New Mexico Code Annotated. Among its duties are the duties "to

develop, to conserve, to protect and to do any and all other things necessary to protect, conserve and develop the waters and stream systems of this state, interstate or otherwise." NMSA 1978, § 72-14-3 (1935). The ISC is also empowered to sell, lease and otherwise dispose of its waters from its water projects. *See* NMSA 1978, § 72-14-26 (1955). In 1950, the ISC became the state representative of the Canadian River Compact with the states of Texas and Oklahoma. In 1951, the New Mexico Legislature ratified the Canadian River Compact, opening the way for the ISC to impound the waters of the Canadian River below the Conchas Dam for conservation storage in Ute Reservoir of up to 200,000 acre-feet for subsequent release for multiple beneficial uses to satisfy future needs of the people of New Mexico. *See* NMSA 1978, § 72-15-2 (1951); *Oklahoma v. New Mexico*, 501 U.S. 221, 111 S. Ct. 2281, 115 L. Ed. 2d 207 (1991).

After many decades of preparation and obtaining funding, the ISC's Ute pipeline project is nearing completion, as evidenced by its application for change of use/place of use granted in 2010. In the meantime, Ute Reservoir has served a beneficial use, among others, as a state park owned by the ISC: "The New Mexico interstate stream commission owns this lake. . . ." 18.17.3.21(P) NMAC.

Without ruling on the validity of the ISC's application, which is not an issue before this Court, it is clear that Applicant is not the owner of the waters deep below its ranch in the San Agustin Basin and that Applicant has not already applied its waters to beneficial use as the ISC has, yet Applicant seeks to obtain incidents of ownership over the underground water basin by deciding who can use the waters and at what cost. Applicant attempts to privatize the powers of the ISC without any of the responsibilities of this public entity serving the owner of this state's waters, the New Mexico public.

If Applicant's plan for a major diversion project were approved, the people of New Mexico would thereby receive a benefit, according to Applicant, of a steady water supply that could accommodate many existing and new uses along the Rio Grande at a time when there is growing stress on this precious resource. But Applicant's offer would come at a heavy price, that price being the relinquishment of the public's constitutionally guaranteed ownership of the state's waters. Under de novo review, this Court finds that, as a matter of law, the application violates the sound policy of public ownership in the waters of this state as declared in the New Mexico Constitution.

V. CONCLUSION

There are no genuine issues of material fact, and Protestants are entitled to judgment as a matter of law. The State Engineer's Order Denying Application is affirmed. Counsel for the State Engineer shall prepare the order reflecting this decision.

Matthew Reynolds, District Judge, Div. II

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

AUGUSTIN PLAINS RANCH, LLC,

Applicant-Appellant,

v. No. 32,705

SCOTT A. VERHINES, P.E.,

New Mexico State Engineer-Appellee,

and

KOKOPELLI RANCH, LLC, et al.,

Protestants-Appellees.

ANSWER BRIEF OF APPELLEE NEW MEXICO STATE ENGINEER

APPEAL FROM THE SEVENTH JUDICIAL DISTRICT COURT
CATRON COUNTY, STATE OF NEW MEXICO
MATTHEW G. REYNOLDS, DISTRICT JUDGE

Pursuant to Rule 214(B)(1) NMRA, the State Engineer respectfully requests oral argument to allow for elaboration on the application review process.

DL Sanders, Chief Counsel
Jonathan Sperber
Tracy Hofmann
Special Assistant Attorneys General
for the New Mexico State Engineer
Post Office Box 25102
Santa Fe, New Mexico 87504-5102
Tel: (505) 827-6150
Fax: (505) 827-3887

VIII. AN APPLICATION MUST BE SUFFICIENTLY SPECIFIC TO ALLOW PERSONS TO DETERMINE WHETHER TO OBJECT

APR would have this Court believe that an application to appropriate groundwater submitted to the State Engineer requires no more detail than the notice pleading required for a civil complaint. **[BIC 46]**. APR asserts, again without supporting authority, that an application only requires basic information because an applicant is automatically entitled to an evidentiary hearing at which the application can be developed. *Id.* This approach is inconsistent with the statutes and rules, which specify the information required for a sufficiently completed application. § 72-12-3(A). By State Engineer rule, an application must set out the elements of water right that would actually be permitted. *See* 19.27.1.10 NMAC ("The application and permit limit the nature and extent of the water right.")

Without the requirement of a complete, detailed and particularized application, the public is denied the information it needs to make an informed decision regarding whether to protest an application. Only with this information can existing water right owners determine whether their water rights may be impaired if a permit is issued. As previously noted, existing water right owners must demonstrate that they have standing in order to object to applications to appropriate groundwater. Section 72-12-3(D) confers standing only on water right owners (1) whose rights may be impaired by the granting of an application, and (2)

who object on the grounds that granting the application will be contrary to the conservation of water within the state or detrimental to the public welfare of the state in the event if they can demonstrate that they will be "substantially and specifically affected by the granting of the application." (emphasis added). In addition, the rule governing application protests provides that "[a]ny person deeming that the granting of an application would be detrimental to his rights may protest in writing the proposal set forth in the application." 19.27.1.14 NMAC. This demands that every protest must set forth the reasons why an application should not be approved. *Id.*

Thus, for a water right owner to analyze whether to expend resources and time to protest, applications must be sufficiently specific so that potential protestants can identify the reason for which they object to the application. Vague or incomplete applications deny water right owners the opportunity to make such an analysis and effectively deny them standing to object, since they cannot file sufficiently specific protests. 19.25.2 NMAC (03/11/1998, as amended through 08/30/2013).

Here, over 900 Protestants objected on the grounds that the Application should not be approved because it was so vague that they did not know whether they should file a protest and, if so, what they should protest. **[1 RP 65, 165]**. In fact, the Application was so vague that it is difficult to assess whether any of the

Protestants actually determined that granting it would be detrimental to their rights before filing their objections. Many of the Protestants may have filed their objections simply as a protective measure. If more concrete information later became available that would allow them to assess if the purposes of use would negatively impact their rights, they would not have missed the opportunity to object. *See* § 72-12-3(D) (requiring objections to the granting of an application to be filed within ten days after last publication of notice).

The Application's vagueness is further evidenced by the State Engineer's uncertainty about APR's intended use of the water right. The State Engineer found that if APR planned to utilize the water rights in one of the ways proposed in the Application, it would potentially have a consumptive irrigation requirement (CIR) of 12.61 acre feet, which would be an impermissible result under New Mexico law because it would constitute waste. **[3 RP 661 ¶¶ 9-11]**. The Application did not state on its face that the permit would actually put water to use in that manner, though, leading to the State Engineer's query about the possible CIR. If the State Engineer could not determine the intended use of water from the Application, then it follows that neither could lay persons.

This is not the way the application and protest process is intended to work. It is simply not in the public interest for WRD to accept applications that are not

sufficiently specific for potential protestants to assess whether they should—or even may—protest the application.

IX. APR COULD SIMPLY REFILE ITS APPLICATION WITH THE INFORMATION REQUIRED BY LAW

Neither the State Engineer's denial of the Application nor the district court's decision upholding the denial has caused APR an injury that requires this Court's intervention. Instead of appealing the State Engineer's decision to the district court and later filing an appeal with this Court, APR could simply have submitted a new application to the State Engineer that comports with law. Instead of refiling, however, APR suggests that the process may suffer from some unstated constitutional infirmity and it attempts to craft an unsupported argument that it has a right to a statutory evidentiary hearing when none exists. In the absence of any legal support for APR's argument that it was entitled to an evidentiary hearing under Section 72-12-3, the Court should not address the argument. *See State v. Clifford*, 1994-NMSC-048, ¶ 19, 117 N.M. 508, 513 (stating that the Supreme Court will not review issues raised in appellate briefs that are unsupported by authority and consist of a mere conclusory reference).

APR states that it has taken "steps to develop evidence in support of its Application and expended significant sums of money and resources drilling a test hole and a production well, beginning the necessary hydrologic analysis, and preparing for an evidentiary hearing before the State Engineer." **[BIC 4]**, *see also*

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

AUGUSTIN PLAINS RANCH, LLC,

Applicant-Appellant,

v.

SCOTT A. VERHINES, P.E.,

New Mexico State Engineer-Appellee,

and

KOKOPELLI RANCH, LLC, et al.,

Protestants-Appellees.

NO. 32,705

ORDER

Appellant, Augustin Plains Ranch, LLC filed a Clarification of Appellant's Position on Supplemental Briefing representing that it "has no intention of pursuing an evidentiary hearing on the merits of the [p]rior [a]pplication, or seeking any other relief with respect to the [p]rior [a]pplication" that is the subject of this appeal. Appellant asserts that an opinion from this Court concerning the prior application has been rendered "unnecessary" because its new application has replaced and superceded the prior application. Appellant's position accords with that of the State Engineer who has represented to the Court that, in light of the fact that Appellant has filed a new application that replaces and supercedes the prior application, the present

appeal is moot. We read Appellant's Clarification to constitute a request to this Court to dismiss its appeal.

The **COURT ORDERS** that the Appeal in Cause No. 32,705 is dismissed. The **COURT FURTHER ORDERS** that the hearing before this Court set for August 21, 2014, at 10:00 a.m. is vacated.

JONATHAN B. SUTIN, Judge

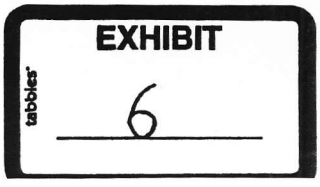
LINDA M. VANZI, Judge

M. MONICA ZAMORA, Judge

http://classifieds.dchieftain.com/search.php?offset=0&search_type=2&a_date=ALL

NOTICE is hereby given that on October 12, 2007, and on May 5, 2008, Augustin Plains Ranch, LLC, c/o Montgomery & Andrews, P.A., P. O. Box 2307, Santa Fe, New Mexico 87504, filed Application No. RG-89943 with the STATE ENGINEER for Permit to Appropriate Underground Water in the Rio Grande Basin. The applicant proposes to drill 37 wells, all with 20-inch casing, and all to a depth not to exceed 3,000 feet in order to divert and consumptively use **54,000** acre-feet of ground water per annum for domestic, livestock, **irrigation**, municipal, industrial, commercial, environmental, recreational, subdivision and related, replacement and augmentation purposes of use. The applicant further proposes to "provide water by pipeline to supplement or offset the effects of existing uses and for new uses" at the proposed places of use described below "in order to reduce the current stress on the water supply of the Rio Grande Basin." The applicant states: "Any impairment of existing rights, in the Gila-San Francisco Basin, the Rio Grande Basin, or any other basin, that would be caused by the pumping applied for, will be offset or replaced." The applicant proposes to irrigate 120 acres of land within a 1,290-foot radius of each of the 37 proposed wells listed below for a total of 4,440 acres of irrigated land within the boundaries of Augustin Plains Ranch, also described below.

The proposed well locations are on land owned by the applicant in Catron County:
RG-89943-POD1: 34 deg., 13 min, 29.779 sec. N lat., 107 deg., 43 min, 13.037 sec. W long.;
RG-89943-POD2: 34 deg., 12 min, 58.958 sec. N lat., 107 deg., 43 min, 12.778 sec. W long.;
RG-89943-POD3: 34 deg., 12 min, 58.177 sec. N lat., 107 deg., 43 min, 47.907 sec. W long.;
RG-89943-POD4: 34 deg., 12 min, 35.848 sec. N lat., 107 deg., 43 min, 13.644 sec. W long.;
RG-89943-POD5: 34 deg., 12 min, 36.275 sec. N lat., 107 deg., 43 min, 47.142 sec. W long.;
RG-89943-POD6: 34 deg., 12 min, 6.665 sec. N lat., 107 deg., 43 min, 48.654 sec. W long.;
RG-89943-POD7: 34 deg., 12 min, 5.993 sec. N lat., 107 deg., 43 min, 13.036 sec. W long.;
RG-89943-POD8: 34 deg., 10 min, 1.772 sec. N lat., 107 deg., 44 min, 16.442 sec. W long.;
RG-89943-POD9: 34 deg., 10 min, 0.982 sec. N lat., 107 deg., 44 min, 51.761 sec. W long.;
RG-89943-POD10: 34 deg., 9 min, 31.664 sec. N lat., 107 deg., 44 min, 48.998 sec. W long.;
RG-89943-POD11: 34 deg., 9 min, 32.342 sec. N lat., 107 deg., 44 min, 18.662 sec. W long.;
RG-89943-POD12: 34 deg., 9 min, 7.181 sec. N lat., 107 deg., 45 min, 18.499 sec. W long.;
RG-89943-POD13: 34 deg., 9 min, 7.200 sec. N lat., 107 deg., 45 min, 51.100 sec. W long.;



RG-89943-POD14: 34 deg., 8 min, 40.493 sec. N lat., 107 deg., 45 min, 50.229 sec. W long.;
RG-89943-POD15: 34 deg., 8 min, 40.850 sec. N lat., 107 deg., 45 min, 17.644 sec. W long.;
RG-89943-POD16: 34 deg., 8 min, 17.728 sec. N lat., 107 deg., 44 min, 15.850 sec. W long.;
RG-89943-POD17: 34 deg., 8 min, 17.186 sec. N lat., 107 deg., 44 min, 49.916 sec. W long.;
RG-89943-POD18: 34 deg., 7 min, 43.544 sec. N lat., 107 deg., 44 min, 51.204 sec. W long.;
RG-89943-POD19: 34 deg., 7 min, 43.653 sec. N lat., 107 deg., 44 min, 16.864 sec. W long.;
RG-89943-POD20: 34 deg., 8 min, 15.697 sec. N lat., 107 deg., 45 min, 17.752 sec. W long.;
RG-89943-POD21: 34 deg., 8 min, 15.832 sec. N lat., 107 deg., 45 min, 50.787 sec. W long.;
RG-89943-POD22: 34 deg., 7 min, 44.814 sec. N lat., 107 deg., 45 min, 52.419 sec. W long.;
RG-89943-POD23: 34 deg., 7 min, 44.043 sec. N lat., 107 deg., 45 min, 18.309 sec. W long.;
RG-89943-POD24: 34 deg., 7 min, 21.076 sec. N lat., 107 deg., 45 min, 18.892 sec. W long.;
RG-89943-POD25: 34 deg., 7 min, 20.532 sec. N lat., 107 deg., 45 min, 53.118 sec. W long.;
RG-89943-POD26: 34 deg., 7min, 21.630 sec. N lat., 107 deg., 46 min, 19.041 sec. W long.;
RG-89943-POD27: 34 deg., 6 min, 52.325 sec. N lat., 107 deg., 45 min, 20.948 sec. W long.;
RG-89943-POD28: 34 deg., 7 min, 22.957 sec. N lat., 107 deg., 44 min, 15.086 sec. W long.;
RG-89943-POD29: 34 deg., 7 min, 21.062 sec. N lat., 107 deg., 44 min, 49.269 sec. W long.;
RG-89943-POD30: 34 deg., 6 min, 53.305 sec. N lat., 107 deg., 44 min, 47.283 sec. W long.;
RG-89943-POD31: 34 deg., 6 min, 53.777 sec. N lat., 107 deg., 44 min, 16.047 sec. W long.;
RG-89943-POD32: 34 deg., 6 min, 32.564 sec. N lat., 107 deg., 44 min, 14.548 sec. W long.;
RG-89943-POD33: 34 deg., 6 min, 32.477 sec. N lat., 107 deg., 44 min, 48.784 sec. W long.;
RG-89943-POD34: 34 deg., 7 min, 45.577 sec. N lat., 107 deg., 46 min, 20.103 sec. W long.;
RG-89943-POD35: 34 deg., 8 min, 14.721 sec. N lat., 107 deg., 46 min, 17.697 sec. W long.;
RG-89943-POD36: 34 deg., 10 min, 1.553 sec. N lat., 107 deg., 45 min, 15.118 sec. W long.; and

RG-89943-POD37: 34 deg., 9 min, 30.586 sec. N lat., 107 deg., 45 min, 15.791 sec. W long.

The proposed wells are generally located north and south of U.S. Highway 60 between the Catron-Socorro County Line and Datil, New Mexico. All of the wells are located within the exterior boundaries of the Augustin Plains Ranch, described below.
The proposed places of use are: (1) Within the exterior boundaries of Augustin Plains Ranch ("Ranch"), which is located in Catron County, New Mexico; and (2) any areas within Catron, Sierra, Socorro, Valencia, Bernalillo, Sandoval, and Santa Fe Counties that are situated within the geographic boundaries of the Rio Grande Basin in New Mexico.

The location of the Ranch is described as follows: Township 1 South, Range 9 West, NMPM: S1/2 Section 1; Section 12; Section 13; Section 14; Section 15; Section 16; Section 20; Section 21; Section 22; Section 23; Section 24; Section 27; Section 28; Section 29; Section 32; Section 33; and Section 34; all in Catron County. Township 2 South, Range 9 West, NMPM: NW1/4 SW1/4 Section 1; Lots 1, 2, 3, 4, S1/2 N1/2, and S1/2 Section 2; Section 3; Section 4; S1/2 SE1/4 Section 7; E1/2, S1/2 SW1/4 Section 8; Section 10; Section 14; Section 15; Section 16; Section 17; Lot 1, NE1/4 NW1/4, N1/2 NE1/4, SE1/4 NE1/4, S1/2 S1/2, and NE1/4 SE1/4 Section 18; all that portion of Section 21 which lies north of old U.S. Highway 60 except the NE1/4 NE1/4 NE1/4 and the N1/2 NW1/4; N1/2, N1/2 S1/2, and SE1/4 SE1/4 Section 22; Section 23; and NE1/4 NE1/4 Section 26; all in Catron County.

Any person or other entity shall have standing to file an objection or protest if the person or entity objects that the granting of the application will: (1) Impair the objector's water right; or (2) Be contrary to the conservation of water within the state or detrimental to the public welfare of the state, provided that the objector shows how he will be substantially and specifically affected by the granting of the application. A valid objection or protest shall set forth the grounds for asserting standing and shall be legible, signed, and include the complete mailing address of the objector. An objection or protest must be filed with the State Engineer not later than 10 calendar days after the date of the last publication of this notice. An objection or protest may be mailed to the Office of the State Engineer, 121 Tijeras NE, Suite 2000, Albuquerque, NM 87102, or faxed to 505-764-3892 provided the original is hand-delivered or postmarked within 24 hours after transmission of the fax.

In the event that a party filed a timely written protest or objection to the original Application to Appropriate RG-89943-POD1 through RG-89943-POD37, filed with the State Engineer on October 12, 2007, it is not necessary to file an additional written protest. A party's timely protest to the original application constitutes a valid protest to the amended application set forth in this notice. To confirm that a written protest was received by the Office of the State Engineer within the required time limits, visit to view the list of timely protestants to the original application. If duplicate protests are received from any group or individual, the second protest will not be acknowledged by letter from the Office of the State Engineer.

The State Engineer will take the application up for consideration in the most appropriate and timely manner practical.

Published on August 13, 20, and 27, 2008.

NOTICE is hereby given that on July 14, 2014, December 23, 2014 and again on April 28, 2016, Augustin Plains Ranch LLC, c/o Draper & Draper LLC, and Montgomery & Andrews, P.A., 325 Paseo del Peralta, Santa Fe, NM 87501 filed Corrected Application No. RG-89943 with the **STATE ENGINEER** for Permit to Appropriate Groundwater in the Rio Grande Underground Water Basin of the State of New Mexico.

The applicant proposes to divert and consume 54,000 acre-feet per annum from 37 proposed wells, proposed to be drilled to depth of 2,000 feet, with 20-inch casing, on land owned by the applicant located as follows;

Well RG-89943-POD1 (applicant's Well No. 1): 34 deg., 13 min., 29.779 sec. N latitude, 107 deg., 43 min., 13.037 sec. W longitude, within the SW ¼ NE ¼ NE ¼ of Section 13, Township 1 South, Range 9 West, NMPM;

Well RG-89943-POD2 (applicant's Well No. 2): 34 deg., 12 min., 58.958 sec. N latitude, 107 deg., 43 min., 12.778 sec. W. longitude, within the NW ¼ SE ¼ SE ¼ of Section 13, Township 1 South, Range 9 West, NMPM;

Well RG-89943-POD3 (applicant's Well No. 3): 34 deg., 12 min., 58.177 sec. N latitude, 107 deg., 43 min., 47.907 sec. W. longitude, within the NE ¼ SW ¼ SW ¼ of Section 13, Township 1 South, Range 9 West, NMPM;

Well RG-89943-POD4 (applicant's Well No. 4): 34 deg., 12 min., 35.848 sec. N latitude, 107 deg., 43 min., 13.644 sec. W. longitude, within the SW ¼ NE ¼ NE ¼ of Section 24, Township 1 South, Range 9 West, NMPM;

Well RG-89943-POD5 (applicant's Well No. 5): 34 deg., 12 min., 36.275 sec. N latitude, 107 deg., 43 min., 47.142 sec. W. longitude, within the SE ¼ NW ¼ NW ¼ of Section 24, Township 1 South, Range 9 West, NMPM;

Well RG-89943-POD6 (applicant's Well No. 6): 34 deg., 12 min., 6.665 sec. N latitude, 107 deg., 43 min., 48.654 sec. W. longitude, within the NE ¼ SW ¼ SW ¼ of Section 24, Township 1 South, Range 9 West, NMPM;

Well RG-89943-POD7 (applicant's Well No. 7): 34 deg., 12 min., 5.993 sec. N latitude, 107 deg., 43 min., 13.036 sec. W longitude, within the NW ¼ SE ¼ SE ¼ of Section 24, Township 1 South, Range 9 West, NMPM;

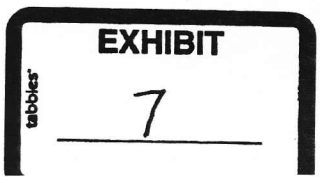
Well RG-89943-POD8 (applicant's Well No. 8): 34 deg., 10 min., 1.772 sec. N latitude, 107 deg., 44 min., 16.442 sec. W. longitude, within the SW ¼ NE ¼ NE ¼ of Section 2, Township 2 South, Range 9 West, NMPM;

Well RG-89943-POD9 (applicant's Well No. 9): 34 deg., 10 min., 0.982 sec. N latitude, 107 deg., 44 min., 51.761 sec. W. longitude, within the SE ¼ NW ¼ NW ¼ of Section 2, Township 2 South, Range 9 West, NMPM;

Well RG-89943-POD10 (applicant's Well No. 10): 34 deg., 9 min., 31.664 sec. N latitude, 107 deg., 44 min., 48.998 sec. W longitude, within the NE ¼ SW ¼ SW ¼ of Section 2, Township 2 South, Range 9 West, NMPM;

Well RG-89943-POD11 (applicant's Well No. 11): 34 deg., 9 min., 32.342 sec. N latitude, 107 deg., 44 min., 18.662 sec. W. longitude, within the SE ¼ NW ¼ SE ¼ of Section 2, Township 2 South, Range 9 West, NMPM;

Well RG-89943-POD12 (applicant's Well No. 12): 34 deg., 9 min., 7.181 sec. N latitude, 107 deg., 45 min., 18.499 sec. W longitude, within the SW ¼ NE ¼ NE ¼ of Section 10, Township 2 South, Range 9 West, NMPM;



Well RG-89943-POD13 (applicant's Well No. 13): 34 deg., 9 min., 7.200 sec. N latitude, 107 deg., 45 min., 51.100 sec. W longitude, within the SW ¼ NE ¼ NW ¼ of Section 10, Township 2 South, Range 9 West, NMPM;
Well RG-89943-POD14 (applicant's Well No. 14): 34 deg., 8 min., 40.493 sec. N latitude, 107 deg., 45 min., 50.229 sec. W longitude, within the SW ¼ NE ¼ SW ¼ of Section 10, Township 2 South, Range 9 West, NMPM;
Well RG-89943-POD15 (applicant's Well No. 15): 34 deg., 8 min., 40.850 sec. N latitude, 107 deg., 45 min., 17.644 sec. W longitude, within the SW ¼ NE ¼ SE ¼ of Section 10, Township 2 South, Range 9 West, NMPM;
Well RG-89943-POD16 (applicant's Well No. 16): 34 deg., 8 min., 17.728 sec. N latitude, 107 deg., 44 min., 15.850 sec. W longitude, within the SW ¼ NE ¼ NE ¼ of Section 14, Township 2 South, Range 9 West, NMPM;
Well RG-89943-POD17 (applicant's Well No. 17): 34 deg., 8 min., 17.186 sec. N latitude, 107 deg., 44 min., 49.916 sec. W longitude, within the SE ¼ NW ¼ NW ¼ of Section 14, Township 2 South, Range 9 West, NMPM;
Well RG-89943-POD18 (applicant's Well No. 18): 34 deg., 7 min., 43.544 sec. N latitude, 107 deg., 44 min., 51.204 sec. W longitude, within the NE ¼ SW ¼ SW ¼ of Section 14, Township 2 South, Range 9 West, NMPM;
Well RG-89943-POD19 (applicant's Well No. 19): 34 deg., 7 min., 43.653 sec. N latitude, 107 deg., 44 min., 16.864 sec. W longitude, within the NW ¼ SE ¼ SE ¼ of Section 14, Township 2 South, Range 9 West, NMPM;
Well RG-89943-POD20 (applicant's Well No. 20): 34 deg., 8 min., 15.697 sec. N latitude, 107 deg., 45 min., 17.752 sec. W longitude, within the SW ¼ NE ¼ NE ¼ of Section 15, Township 2 South, Range 9 West, NMPM;
Well RG-89943-POD21 (applicant's Well No. 21): 34 deg., 8 min., 15.832 sec. N latitude, 107 deg., 45 min., 50.787 sec. W longitude, within the SW ¼ NE ¼ NW ¼ of Section 15, Township 2 South, Range 9 West, NMPM;
Well RG-89943-POD22 (applicant's Well No. 22): 34 deg., 7 min., 44.814 sec. N latitude, 107 deg., 45 min., 52.419 sec. W longitude, within the NE ¼ SW ¼ SW ¼ of Section 15, Township 2 South, Range 9 West, NMPM;
Well RG-89943-POD23 (applicant's Well No. 23): 34 deg., 7 min., 44.043 sec. N latitude, 107 deg., 45 min., 18.309 sec. W longitude, within the NW ¼ SE ¼ SE ¼ of Section 15, Township 2 South, Range 9 West, NMPM;
Well RG-89943-POD24 (applicant's Well No. 24): 34 deg., 7 min., 21.076 sec. N latitude, 107 deg., 45 min., 18.892 sec. W longitude, within the SW ¼ NE ¼ NE ¼ of Section 22, Township 2 South, Range 9 West, NMPM;
Well RG-89943-POD25 (applicant's Well No. 25): 34 deg., 7 min., 20.532 sec. N latitude, 107 deg., 45 min., 53.118 sec. W longitude, within the NE ¼ SW ¼ NW ¼ of Section 22, Township 2 South, Range 9 West, NMPM;
Well RG-89943-POD26 (applicant's Well No. 26): 34 deg., 7 min., 21.630 sec. N latitude, 107 deg., 46 min., 19.041 sec. W longitude, within the SW ¼ NE ¼ NE ¼ of Section 21, Township 2 South, Range 9 West, NMPM;
Well RG-89943-POD27 (applicant's Well No. 27): 34 deg., 6 min., 52.325 sec. N Latitude, 107 deg., 45 min., 20.948 sec. W Longitude, within the NW ¼ SE ¼ SE ¼ of Section 22, Township 2 South, Range 9 West, NMPM;

Well RG-89943-POD28 (applicant's Well No. 28): 34 deg., 7 min., 22.957 sec. N latitude, 107 deg., 44 min., 15.086 sec. W longitude, within the SW ¼ NE ¼ NE ¼ of Section 23, Township 2 South, Range 9 West, NMPM;
Well RG-89943-POD29 (applicant's Well No. 29): 34 deg., 7 min., 21.062 sec. N latitude, 107 deg., 44 min., 49.269 sec. W longitude, within the NW ¼ SE ¼ NW ¼ of Section 23, Township 2 South, Range 9 West, NMPM;
Well RG-89943-POD30 (applicant's Well No. 30): 34 deg., 6 min., 53.305 sec. N latitude, 107 deg., 44 min., 47.283 sec. W longitude, within the NE ¼ SW ¼ SW ¼ of Section 23, Township 2 South, Range 9 West, NMPM;
Well RG-89943-POD31 (applicant's Well No. 31): 34 deg., 6 min., 53.777 sec. N latitude, 107 deg., 44 min., 16.047 sec. W longitude, within the NW ¼ SE ¼ SE ¼ of Section 23, Township 2 South, Range 9 West, NMPM;
Well RG-89943-POD32 (applicant's Well No. 32): 34 deg., 6 min., 32.564 sec. N latitude, 107 deg., 44 min., 14.548 sec. W longitude, within the SW ¼ NE ¼ NE ¼ of Section 26, Township 2 South, Range 9 West, NMPM;
Well RG-89943-POD33 (applicant's Well No. 33): 34 deg., 6 min., 32.477 sec. N latitude, 107 deg., 44 min., 48.784 sec. W longitude, within the SW ¼ NE ¼ NW ¼ of Section 26, Township 2 South, Range 9 West, NMPM;
Well RG-89943-POD34 (applicant's Well No. 34): 34 deg., 7 min., 45.577 sec. N latitude, 107 deg., 46 min., 20.103 sec. W longitude, within the NW ¼ SE ¼ SE ¼ of Section 16, Township 2 South, Range 9 West, NMPM;
Well RG-89943-POD35 (applicant's Well No. 35): 34 deg., 8 min., 14.721 sec. N latitude, 107 deg., 46 min., 17.697 sec. W longitude, within the SW ¼ NE ¼ NE ¼ of Section 16, Township 2 South, Range 9 West, NMPM;
Well RG-89943-POD36 (applicant's Well No. 36): 34 deg., 10 min., 1.553 sec. N latitude, 107 deg., 45 min., 15.118 sec. W longitude, within the SW ¼ NE ¼ NE ¼ of Section 3, Township 2 South, Range 9 West, NMPM; and
Well RG-89943-POD37 (applicant's Well No. 37): 34 deg., 9 min., 30.586 sec. N latitude, 107 deg., 45 min., 15.791 sec. W longitude, within the NW ¼ SE ¼ SE ¼ of Section 3, Township 2 South, Range 9 West, NMPM. Said wells are generally located north and south of U.S. Highway 60, and east of Datil, Catron County, New Mexico, for municipal purposes, including, but not limited to the following municipal entities and their service areas; the Village of Magdalena, the City of Socorro, the City of Belen, the Village of Los Lunas, the Albuquerque Bernalillo County Water Utility Authority and the City of Rio Rancho, and commercial bulk water sales in parts of Catron, Sierra, Socorro, Valencia, Bernalillo, Sandoval and Santa Fe Counties, limited to those portions that lie within the geographic boundaries of the Rio Grande Basin, including various municipal and investor owed utilities, commercial enterprises, and state and federal government agencies, including the U.S. Bureau of Reclamation and the New Mexico Interstate Stream Commission whereby groundwater would be directly discharged to the Rio Grande. Distribution and access connections are via an underground transmission pipeline along three (3) primary right-of-way corridors beginning east of Datil, New Mexico along U.S. Highway 60 approximately 56 miles east to Interstate 25, then north along Interstate 25 approximately 65 miles to State Road 45, the Coors Boulevard interchange, then north along Coors Boulevard approximately 20 miles and ending at State Road 528, Alameda Boulevard.

Applicant proposes that any impairment of existing rights in the Gila-San Francisco Basin and the Rio Grande Basin, or any other basin, that would be caused by the applied for pumping, will be offset or replaced. Applicant also intends to construct enhanced recharge facilities which will collect runoff that would otherwise evaporate in the Plains of Augustin, recharge water that will augment the groundwater in the aquifer and offset the amount of water diverted from the Applicant's wells. The Applicant also requests credit for the enhanced recharge facilities, which is subject to approval by the State Engineer.

The applicant also filed with the Corrected Application the following documents: Attachment 1- Point of Diversion Descriptions, Attachment 2 – Overview of Project, Proposed Hearing Procedure and Additional Information for Sections of the Application, Exhibit A – Project Description, Exhibit B- Investor Letters, Exhibit C – POD Map, Exhibit D – Routing Analysis, Exhibit E – Rio Rancho Letters, Exhibit F - Sample Agreements and Exhibit G – Technical Memorandum: Summary of Updated Conceptual Design, which may be viewed between the hours of 8:00-12:00 and 1:00-5:00 Monday through Friday, at the District 1 Office of the State Engineer, 5550 San Antonio Drive NE, Albuquerque, NM 87114, or online at www.ose.state.nm.us/ALU/index.

Any person, firm or corporation or other entity having standing to file objections or protests shall do so in writing (objection must be legible, signed, and include the writer's complete name, phone number and mailing address). The objection to the approval of the application must be based on: (1) Impairment; if impairment, you must specifically identify your water rights; and/or (2) Public Welfare/Conservation of Water; if public welfare or conservation of water within the state of New Mexico, you must show how you will be substantially and specifically affected. The written protest must be filed, in triplicate, with the State Engineer, 5550 San Antonio Drive NE, Albuquerque, NM 87109-4127, within ten (10) days after the date of the last publication of this Notice. Facsimiles (faxes) will be accepted as a valid protest as long as the hard copy is hand-delivered or mailed and postmarked within 24-hours of the facsimile. Mailing postmark will be used to validate the 24-hour period. Protests can be faxed to the Office of the State Engineer, (505) 383-4030. If no valid protest or objection is filed, the State Engineer will evaluate the application in accordance with the provisions of Chapter 72 NMSA 1978.

In the event that a party filed a timely written protest or objection to the original Application to Appropriate RG-89943, filed with the State Engineer on October 12, 2007 and May 5, 2008, it is not necessary to file an additional written protest. Those protests or objections are considered timely for this corrected application and notice of publication.

NOTE TO PUBLISHER: Immediately after last publication, publisher is requested to file affidavit of such publication with the Office of the State Engineer, 5550 San Antonio Dr. NE, Albuquerque, NM 87109-4127

2010 AUG 26 PM 3:27

BEFORE THE NEW MEXICO STATE ENGINEER

IN THE MATTER OF THE APPLICATION BY AUGUSTIN PLAINS RANCH, LLC FOR PERMIT TO APPROPRIATE GROUNDWATER IN THE RIO GRANDE UNDERGROUND WATER BASIN OF NEW MEXICO	)))))	**Hearing No. 09-096** **OSE File No. RG-89943**

ENTRY OF APPEARANCE

COMES NOW the New Mexico Environmental Law Center (Bruce Frederick) and enters its appearance in the Hearing No. 09-096 on behalf of the Protestants identified on the attached Exhibit A.

Respectfully submitted:

NEW MEXICO ENVIRONMENTAL LAW CENTER

By: _____

R. Bruce Frederick
Jon Block
Eric Jantz
Douglas Meiklejohn
1405 Luisa Street, Ste. 5
Santa Fe, NM 87505
(505) 989-9022
bfrederick@nmelc.org

Attorneys for Protestants Identified on Exhibit A

EXHIBIT 8

NMELC CLIENT LIST
AUGUSTIN PLAINS RANCH APPLICATION
HEARING No. 09-096

Abbe Springs Homeowners Ass'n Marshall Adams, President	Manuel & Gladys Baca	Robert and Mona Bassett
Christopher Scott Sansom	Anne Schwebke Bill Schwebke	M. Ian Jenness Margareet Jenness
Patti BearPaw	Thomas Betras, Jr. Lisa Burroughs	Bruton Ranch, LLC Jack W. Bruton
Ann Boulden	David & Terri Brown	Charles & Lucy Cloyes
Michael D. Codini, Jr.	Randy Coil Coil Family Partnership	James & Janet Coleman
Thomas A. Cook	Gloria Weinrich	Randy Cox
Wildwood Highlands Landowners Assoc., Tom Cook, President	Nancy Crowley	Roger and Dolores (Jeanne) Daigger
Michael & Ann Danielson	Bryan and Beverley Dees	John and Eileen Dodds
Louise & Leonard Donahe	Ray and Kathy Sansom	
Patricia Eberhardt	Roy Farr	Paul and Rose Geasland
Gila Conservation Coalition c/o Allyson Siwik	Michael Hasson	Don and Cheryl Hastings
Gary and Carol Hegg	Patricia Henry	Tom Csurilla
Catherine Hill	Eric Hofstetter	Sandy How
Homestead Landowners Assoc. Patty Germain, President	Amos Lafon	Cleda Lenhardt
Marie Lee	Rick and Patricia Lindsey	Victoria Linehan
Owen Lorentzen	Maureen M. MacArt & James Wetzig	Sonia Macdonald
Robert MacKenzie	Douglas Marable	Thea Marshal
Sam and Kristin McCain	Jeff McGuire	Michael Mideke
Kenneth Mroczek	Peter John and Regina M. Naumnik	Robert Nelson
Dennis and Gertrude O'Toole	Walter and Diane Olmstead	Karl Padget

Max Padget	Barney and Patricia Padgett	Wanda Parker
Ray C. and Carol W. Pittman	John H. Preston & Patricia A. Murray Preston	Janice Przybyl
Daniel Rael	Stephanie Randolph	Mary Catherine Ray
Kenneth Rowe	Kevin & Priscilla L. Ryan	John and Betty Schaefer
Susan Schuhardt	Ann and Bill Schwebke	Janice Simmons
Jim Sonnenberg	Anne Sullivan	Margaret Thompson & Roger Thompson
Donald and Margaret Wiltshire		

SERVICE LIST
HEARING NO. 09-096/OSE FILE NO. RG-89943

I certify that I emailed a copy of the foregoing document to the persons listed below on the 26th day of August, 2010.

R. Bruce Frederick

Amy Haas amy.haas@state.nm.us	Bidtah Becker bidtahnbecker@navajo.org	David Mielke dmielke@abqsonosky.com
George Chandler geo_c@cybermesa.com	James Karp james.karp@state.nm.us	James Noble jim@noblelawfirm.com
Jane Marx janemarx@earthlink.net	Jeff Albright jalbright@lrlaw.com	Jeff Wechsler JWechsler@montand.com
Jill Smith jill.smith@colvilletribes.com	Jim Brockmann jcbrockmann@newmexicowaterlaw.com	Karl Johnson kjohnson@luebbenlaw.com
Maria O'Brien mobrien@modrall.com	Noell Graney ngrany@nordhauslaw.com	Peter Chestnut pcc@chestnutlaw.com
Ron Shortes shortes@gilanet.com	Sherry Tippett shertippett@msn.com	Stacy Goodwin stacy@childresslaw.com
Stephen Hernandez slh@lclaw-nm.com	Stephen Hubert sah@lclaw-nm.com	Steven Hughes shughes@slo.state.nm.us
Susan Jordan sjordan@nordhauslaw.com		